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TENNESSEE REPORTS.

Tenn 13

15

REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE YEARS

1871-2.

JOSEPH B. HEISKELL,

REPORTER.

VOLUME III.

NASHVILLE:

JONES, PURVIS & CO.,.....PRINTERS TO THE STATE.

1872.

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Wilson v. State, 7 Yer., 516.....12, 13
Winchester v. Winchester, 1 Head, 460.. 641
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Y

Young v. Butler, 1 Head, 648..... 524
Young v. Hare, 1 Hum., 304..... 273

ERRATA.

Page 85, line 6 from foot—For "9 Hum.," 374, read "9 *Yer.*"

Page 177, line 12 from top—For "Art.," read "*Sec.*"

Page 317, line 3 from foot—For "H. H. Ingersoll," read "*A. B. Wilson.*"

Page 344, line 10 from foot—For "4126," read "4626."

Page 344, line 12 from foot—For "4597," read "4598."

Page 363, line 5 from foot——For "95," read "115."

Page 461, line 5 from foot—For "3 Heis., 376," read "10 *Hum.*, 101."

Page 739, see Equitable Assets and Equitable Set-off.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

KNOXVILLE,.....SEPTEMBER TERM, 1870.

THE STATE *v.* JAMES BROWN *et als.*

INDICTMENT. *Repetition of Defendants' names.* An indictment, after charging the several defendants by name, with an assault and battery on the prosecutor, proceeded, "*they the said,*" (omitting to repeat their names) "*then and there having in their possession certain pistols,*" &c., with intent to intimidate, &c. Held that the omission to repeat the names was not material, and that the indictment sufficiently charged a felony under the Code, § 4628.

Case cited: *State* v. *Pearce*, Peck, 66.

FROM BLOUNT.

Appeal in error, by the State from the Circuit Court of Blount county. ELIJAH T. HALL, J., presiding.

Attorney General HEISKELL, for the State, cited Code 5114, 5117.

A. CALDWELL and CATE, for defendants.

The State *v.* James Brown *et als.*

NELSON, J., delivered the opinion of the Court.

The indictment in this case, is founded upon the Code, 4628, which provides that "if any person assaults and beats another with a cowhide, stick or whip, having, at the time, in his possession, a pistol or other deadly weapon, with intent to intimidate the person assaulted, and prevent him from defending himself, he shall, on conviction, be imprisoned in the penitentiary not less than two nor more than ten years." It is charged, in the indictment, that James Brown and nine others therein named, "late of said county, laborers, on the tenth day of April, in the year of our Lord eighteen hundred and sixty-nine, with force and arms, in the county of Blount, aforesaid, unlawfully and feloniously, did assault and beat one Jacob Smith, in the peace of the State then and there being, with certain cowhides, sticks and whips, *they, the said,* then and there having in their possession certain pistols and other deadly weapons, with intent to intimidate him, the said Jacob Smith, and prevent him from defending himself, &c."

Six of the defendants named in the indictment, filed a general demurrer thereto, which, on argument, was sustained. The Attorney General excepted to this action of the court, and prayed an appeal in the nature of a writ of error, to this court. The demurrer seems to have been treated as the demurrer of all the defendants, and they were all recognized to appear at this court. There is no formal joinder in demurrer on the part of the State, as required in 1 Wat. Arch. Cr. Pl., 382 top, 116, marg., and in 1 Chitty, Cr. Law, 359, in cases of

felony; but, the form of demurrer might be *ore tenus*, even in capital cases, according to 1 Chit. Cr. Law, Riley's edition, 359, top, 441, marg.

It is insisted, in behalf of the defendants, that the indictment does not charge the offense with certainty and precision, because their names are all omitted after the words "*the said*," or that, if these words are retained, it is obscure and unintelligible.

Judge Whyte, in delivering the opinion of this court, in the case *State* v. *Pearce*, Peck R., 66, 67, said that it was observed, by that great Judge, Lord Hale, that "the strictness required in indictments had grown to be a great blemish and inconvenience in the law and the administration thereof; that more offenders escaped by the over-easy ear given to exceptions to indictments than by the manifestation of their innocence, and that the grossest crimes had gone unpunished by reason of these unseemly niceties." He says further, that "Lord Mansfield maintains that, while tenderness ought always to prevail in criminal cases, yet it does not require such a construction of words as would tend to render the law nugatory and ineffectual, nor does it require of us to give into such nice and strained critical objections as are contrary to its true meaning and spirit."

Such seems to have been the opinion of our State Legislature, at the time of the adoption of the Code, and much of the ancient strictness in criminal proceedings was abolished. Among other things, it is provided by section 5114, that "the statement of the facts constituting the offense, in an indictment, shall be in ordinary and concise language, without prolixity or repeti-

tion; and by section 5117, that the act or omission charged as the offense, shall be stated, with such degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case."

In 1 Chit. Cr. Law, 171, mar., it is stated that "the indictment must state the facts of the crime, with as much certainty as the nature of the case will admit." Again, it is said, "if the sense be clear, nice objections ought not to be regarded;" and that "the word aforesaid," in general, refers to the last antecedent, but not so invariably as the word *same*, which is more explicit; and matter stated in parenthesis saves the rule of grammar; that the words—"*the said*" and "*aforesaid*" refer to the last antecedent, and it is not necessary to repeat the nominative case to all the allegations in one continuing sentence. *Ibid*, 173, m. The same author says, further, that "if the indictment can be supported without the words which are bad, they may, on arrest of judgment, be rejected as surplusage." *Ibid*, 173, 174, m. And that, "if any unnecessary averments, not intimately connected with the circumstances which constitute the crime, be introduced, they need not be proved on the trial, but will be rejected as surplusage." *Ibid*, 232, m. In continuation of the same subject, he states, 237, m., that "where the contradictory, or repugnant expressions do not enter into the substance of the offense, and the indictment will be good without them, they may be rejected as surplusage."

Applying these rules of criminal pleading, and the provisions of the Code, to the indictment under consideration, we declare the law to be, that it was not neces-

sary to repeat the names of the defendants in the indictment, although the words "the said" would seem to indicate that such was the purpose of the draughtsman; that those words may be rejected as surplusage, and that the word "they," which immediately precedes them, has distinct reference to, and upon any correct rule of grammatical construction can only mean, the defendants, whose names are stated in the previous part of the indictment. The words—"they, the said, having in their possession certain pistols," &c.—so evidently refer to the persons previously named, that the meaning can not be considered as doubtful; and "clerical or grammatical errors will not vitiate an indictment, unless the meaning is obscured." *State* v. *Wimberly*, 3 McCord, 190, cited in 1 Wat. Arch. Cr. Pl., 304, n. These views are further supported by the authorities cited in the same book, pp. 262, 300.

Let the judgment be reversed, and the plaintiffs be recognized to appear at the next term of the Circuit Court of Blount county, to answer the indictment.

The State *v.* James Townsell.

THE STATE *v.* JAMES TOWNSELL.

INDICTMENT. *Disturbing public worship.* A presentment for disturbing public worship, which does not charge the acts committed, to have been "wilfully" done, is bad.

Cases cited: *State* v. *Doty*, 5 Cold., 34; *Morrow* v. *State*, 10 Hum., 120.

FROM SEVIER.

In the Circuit Court. E. E. GILLENWATERS, J., presiding, quashed the presentment, and the State appealed.

Attorney General HEISKELL, for the State.

SNEED, J., delivered the opinion of the Court.

The defendant was arraigned in the Circuit Court of Sevier county, upon a presentment for disturbing public worship. The presentment was quashed upon defendant's motion, and the Attorney General has appealed. The section of the Code upon which the presentment is founded is in the following words: "If any person wilfully disturb or disquiet any assemblage of persons met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of worship, he shall be fined not less than twenty nor more than two hundred dollars, and may also be imprisoned not exceeding six months in the common jail." Code, 4853.

The presentment charges that the acts alleged were

unlawfully done, but does not charge that they were done "wilfully." We hold that this is a fatal defect in an indictment or presentment for this offense, founded upon the Code. The word unlawfully is not the synonym of the word wilfully; nor can it be said that every act unlawfully done is wilfully done. The Code provides that all indictments for offenses designated by law, which are offenses at common law, are good if the offense is charged or described according to the common law: Sec. 5119. We are not aware that this was an offense at common law. The English statute of William and Mary, c. 18, provides, that if any person shall, wilfully, maliciously or contemptuously, disturb any congregation assembled in any church or permitted meeting house, or shall misuse any preacher or teacher there, he shall be bound over to the sessions of the peace, and forfeit twenty pounds: 4 Bl. Com., 54. So far as we are familiar with English forms of indictment for this offense, the word wilfully is invariably used, and under our statute we hold it essential. Though the point was not precisely in judgment in the case of *The State* v. *Doty*, 5 Cold., 34, yet the Court in that case intimate a like opinion. The rule is, that words found in the very definition of an offense, either at common law or in a statute, or some equivalent phrases, must be used in an indictment in charging the offense: Whart. Am. Cr. Law, 144. See *Morrow* v. *The State*, 10 Hum., 120.

The State *v.* Arnold Ailey.

The State *v.* Arnold Ailey.

Indictment. *Joinder of offenses.* An indictment for mayhem may charge in the same count that the defendant did "slit, cut off and bite off the ear," &c.

Code construed: 4606, 5121.

Case cited: *Whiteside* v. *State*, 4 Cold., 182.

FROM JEFFERSON.

From the Circuit Court. J. P. Swann, J., presiding, on motion, quashed the indictment, and the State appealed.

Attorney General Heiskell, for the State.

J. R. Cocke, for defendant.

Nelson, J., delivered the opinion of the Court.

The charging part of the indictment in this case, is, that the defendant, on, &c., "unlawfully, maliciously and feloniously, did slit, cut off and bite off, the ear of John Tarwater, whereby the said John Tarwater is maimed and disfigured, &c.," and it is insisted for defendant, that the indictment is bad, because it charges two or more distinct offenses in one count. It is provided, among other things, in the Code, 4606, "that no person shall unlawfully and maliciously slit, cut off or bite off the nose, ear or lip of another, or any part of either of them, whereby the person is maimed or disfigured;" and it is argued for the defendant, that the three offenses of

slitting, cutting off, and biting off, the nose, lip or ear of another, are embraced in the statute, and can not be included in one count of the same indictment. If this were a valid objection at common law, it was probably the intention of the Legislature to guard against it, in the Code, 5121, which provides that "an offense may be charged in an indictment in different forms, so as to meet the evidence in the case; and where it may have been committed by different means, the means may be alleged in the same count in the alternative.

While each of the acts of slitting, cutting off, and biting off, may be committed separately, and be indictable, we can not say that they may not be committed as parts of the same transaction, so as to constitute one offense, nor that, if they are jointly charged, the proof of either would not be sufficient to support the indictment. The defendant can not be embarrased in his defense, nor could the Court be at a loss to pronounce judgment, as where felonies of a different nature and punishable in a different manner, or distinct felonies and misdemeanors, are embraced in the same indictment. In Wharton's Cr. Law, 2d ed., 141, it is said: "Where a statute * * makes two or more distinct acts connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has, in many cases, been ruled that they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense. Yet, when both are perpetrated by the same person at the same time, they constitute but

one offense, for which one count is sufficient, and for which but one penalty can be inflicted. An indictment which charges the prisoner with the offenses of falsely making, forging and counterfeiting, of causing and procuring to be falsely made, forged and counterfeited, and of willingly aiding and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of these charges are contained in a single count." So a count in an indictment is not demurable for duplicity, which charges that defendant destroyed, and maliciously caused certain property to be destroyed; nor a count which charges that the defendant did administer to, and cause to be administered to and taken by, three certain persons, a quantity of arsenic: 1 Wat. Arch. C. Pl., 314. And in this case, the three acts charged may constitute one offense, and be punishable as such, or the averments may be divisible, as upon indictments for murder, burglary and larceny, robbery and larceny, larceny of more articles than one, the battery of two or more persons, or the libel of two or more persons, where it is one single act, and the like: Rosc. Cr. Ev., 2d ed., 90, 91.

This view of the case is not in conflict with the opinion in *Whiteside* v. *The State*, 4 Cold., 182, 183. There the charge was in the disjunctive, but here the various acts are connected by the copulative conjunction. It follows that the Circuit Court erred in quashing the indictment, and the judgmeut is reversed and the cause remanded.

ROBERT L. TURLEY v. THE STATE.

STATUTE OF LIMITATIONS. A party indicted, for a felony which includes a misdemeanor, is, if the proof shows him not guilty of the felony, and not guilty of the misdemeanor within twelve months, entitled to an acquittal.

Code construed: 4983, 4988, 5122, 5223.

Statute cited and construed: 1820, c. 9.

Cases approved: *Wilson* v. *The State*, 7 Yer. 516; *State* v. *Bowling*, 10 Hum. 52.

Case overruled: *Carden* v. *State*, 3 Head, 268.

FROM GRAINGER.

In the Circuit Court. JAS. H. RANDOLPH, J., presiding.

JAS. T. SHIELDS, for plaintiff in error.

Attorney General HEISKELL, for the State.

SNEED, J., delivered the opinion of the Court.

The plaintiff in error was indicted in the Circuit Court of Grainger county, for an assault to commit murder in the first degree. The indictment was found at the April Term, 1865, and the offense was alleged and proven to have been committed on the 24th of March, 1863. At the August Term, 1870, the plaintiff in error was put upon his trial, and was convicted of a simple assault, and was adjudged by the court to

imprisonment for three months in the county jail, and to pay a fine of fifty dollars. His motion for a new trial was disallowed, and he has appealed.

The decisive question in this case, and the only one to which it is necessary to refer, is as to the right of the plaintiff in error to a new trial, when it had been disclosed in the proof that the assault of which he was convicted, was committed more than twelve months before the indictment was found. The Code provides that all prosecutions for misdemeanors, unless otherwise expressly provided, shall be commenced within twelve months next after the offense has been committed. 4983.

This was also in substance the provision of the act of 1820, c. 9. It is provided also, that on an indictment for a public offense admitting of different degrees, the defendant may be convicted of such offense, or any degree lower than that charged in form in the indictment 5122, *et vide* 5223. Under this provision the jury had the authority to find the party guilty, as they did, of a simple assault. The proof shows that the offense was committed on the 23d of March, 1863; and there is no evidence that the plaintiff in error was not "usually and publicly resident within this State" for any period intervening between that day and April Term, 1865, of the Circuit Court, to effect the bar of the statute: Code, 4988. The plaintiff in error was entitled to a new trial, in order to avail himself of this limitation. This is not a new question in this court, though there is some conflict of authority upon it. In the case of *Wilson* v. *The State*, 7 Yerg., 516,

it was held, where the defendant was indicted for an assault and battery, with an intent to commit murder in the first degree, and found guilty of an assault and battery only, which had been committed more than twelve months before the finding of the indictment, that the statute of 1820, c. 9, was a bar to the prosecution. In the case of *The State* v. *Bowling*, 10 Hum., 52, the question came before this court in another form, and it was held, that the proper plan for defendant to avail himself of the defense of the statute of limitations of twelve months, was by proof of the fact on the trial, and not by motion in arrest of judgment, plea or demurrer. That case recognizes the doctrine of the case of *Wilson* v. *The State*, 7 Yerg., 516, but only undertakes to settle a question of practice under it. A contrary doctrine, however, is held in the case of *Carden* v. *The State*, 3 Head., 268, to the effect, that if the prosecution be for a felony, and the party be convicted of a misdemeanor, the limitation prescribed in felonies of the grade of that charged, will apply, and not the limitation for the misdemeanor, of which the party was found guilty. We can not assent to this proposition. The citizen has a right to be tried by the forms and requirements of the law. In the accusation of felony against him, he is also accused of a misdemeanor. A conviction of the misdemeanor, charged and proven to have been committed more than one year before the finding of the bill of indictment, is a nullity. He can not be punished for it. We had rather accept the reasoning in *Wilson* v. *The State*, 7 Yerg., 516, of Judge Green,

that a contrary doctrine would defeat the intention of the act of Assembly, and prosecutions for assaults and batteries, might be gotten up at any distance of time, provided a grand jury could be induced to find a bill for an assault with an intent to kill. A temptation would be held out to prosecutors too, to commit perjury, in order to get such indictment found that the statute of limitations may not operate.

The judgment is reversed and a new trial granted.

Whereupon, by leave of the Court, the Attorney General entered a *nol pros.*

HARDY COLLINS *v.* THE STATE.

1. INDICTMENT. *Attempt to poison.* A charge of an "attempt to give and administer poison, by purchasing it and placing it in the hands of the defendant's minor son, advising and directing him to administer it," is sufficient in an indictment for an attempt to administer poison, under the Code, 4626.

2 SAME. *Same. Assault.* It is not necessary to charge an assault, in an indictment for this offense.

FROM GREENE.

In the Criminal Court, A. W. HOWARD, J., presiding.

Attorney General HEISKELL, for the State, cited Code, 4626; Bouv. L. D.; Russell on Cr., 46; Higgins Case,

2 East, 5; Whar. Am. Cr. Law, 38; commented on, 1 Archb., mar. 91, top 259; citing 1 Car. & K., 589.

TURNEY, J., delivered the opinion of the Court.

The judgment of the Circuit Court must be reversed, because of the admission on the trial, of illegal testimony.

The plaintiff in error, was indicted in the Criminal Court of Greene county, under § 4626 of the Code, which provides:

"Whosoever shall feloniously and with malice aforethought, assault any person, with intent to commit murder in the first degree, or shall administer, or attempt to give any poison or potion for that purpose, though death shall not ensue, shall, on conviction, be imprisoned in the penitentiary not less than three, nor more than twenty-one years."

The indictment is predicated upon the last clause of said section, and charges that plaintiff in error, "unlawfully, wilfully, feloniously and of his malice aforethought, did attempt, with intent to commit murder in the first degree, to give and administer to one George Shipman, colored, a large quantity of certain deadly poison, called white arsenic, by purchasing and procuring the said white arsenic and by placiug the same in the hands of one Benjamin Collins, the minor son of the said Hardy Collins, on the day and year aforesaid, at to-wit: in the county aforesaid, and at the same time and place, advising, directing and commanding the said Benjamin Collins, he the said Collins' minor son, to give and administer the said white arsenic to the said George Shipman, he, the said Hardy Collins, well knowing that the said white arsenic

was a deadly poison, with intent then and thereby feloniously, willfully, and of his malice aforethought, him, the said George Shipman, to kill and murder in the first degree," &c.

On the trial, and against the objection of plaintiff in error, J. O. Hankins, a witness for the State, was permitted to state that the physician, or druggist, "who tested the powder," said it was white arsenic.

Mary King, another witness for the State, was allowed to say, in answer to a question of the Attorney General, plaintiff in error objecting, that Ben. Collins said to her, "my pap gave me something to poison George Shipman with." There is nothing in the record showing the presence of the plaintiff in error, at the time of these declarations; in fact, we are forced to the conclusion, after looking to the whole record, that he was not present. The evidence is, therefore, mere hear-say, of the most unsatisfactory and unreliable character, and clearly incompetent.

The plaintiff in error, was convicted and sentenced to the penitentiary for three years.

There was motion in arrest of judgment, and the following reasons assigned:

1st. Said indictment does not charge that the defendant made any assault, as required by statute.

2d. That said indictment does not show that the grand jurors found the same upon their oath, as grand jurors.

3d. That said indictment charges said defendant, as a principal, yet upon its face, it shows that, if guilty at all, he would be an accessory before the fact.

4th. That the defendant stands convicted by the verdict of the jury, of a felony, when the indictment only charges

him with an attempt to commit crime, which is not a felony, but a misdemeanor.

The court overruled the motion upon these propositions. There was no error in the ruling of the court.

The first assignment is answered by the statute under which the indictment is had. The offense charged, although in the same section, is in a separate and distinct sentence from the one in which the word "assault" is used, the two sentences defining distinct offenses, and affixing to each a punishment, the one greater than the other. The term "assault" has no reference to the crime last defined.

The second assignment is a misconception of the record, the caption of which, as well as that of the indictment, recites that the jury was sworn, and the body of the indictment averring "the Grand Jurors, aforesaid, upon their oaths, aforesaid, do say, &c."

The third and fourth assignments embrace the ground mainly relied upon in argument, for the accused, in support of which, it is earnestly, and, we must say, ably insisted, that the charges of the indictment, upon the facts, do not make an indictable offense, such as is contemplated by the statute. It is argued that, if the prisoner procured the poison and gave it to another, with instructions and command to that other, to "put it in George Shipman's coffee, or apples, or any thing he ate," although it appears that George Shipman, whom it is alleged that the prisoner purposed to poison, and Ben. Collins, the son of the prisoner, to whom the prisoner gave the poison, with the instructions mentioned, lived at the same place, is not an "attempt to give poison."

We can not concur in this construction of the law. The son of the prisoner, assuming the allegations to be true; as we must upon the consideration of the question as presented; was merely the instrument, through and by which the prisoner purposed and intended to accomplish his purpose; the fact that it is an agent, responsible or irresponsible, does not change the result from his conduct. The person used is, so far as the crime of the prisoner is concerned, just as would be an inanimate means used to effect the ends desired, simply the instrument. If the prisoner, knowing the place at which his intended victim ate, had gone there and fixed the poison in a way likely to be taken, or in any way which he thought would make it likely to be taken by Shipman, this would be an attempt to give; or if he, knowing Shipman was in the habit of passing in a certain direction, were to place poison or poisoned food in his path, intending him to eat it, although Shipman did not pass in the direction, and, as a consequence, did not eat the poison, still the conduct of the prisoner would be an attempt to give.

If the son had put the poison in the coffee, apples, or other food of Shipman, or had by any means, induced him to take the poison, as instructed and commanded by his father, and death had ensued, both would have been guilty, according to the definition of the statute, of administering poison.

In this case, according to the indictment, the intent to give is perfect, the plan of giving determined, and its execution set in motion, the poison has left the hands of the prisoner, in furtherance of his purpose, but fails, not

because of his abandonment of the design, but because of the insufficiency of his medium.

The word "attempt," as used in the statute, contemplates a failure. Such is its usual import; it has this definite and restricted meaning in the statute.

Administering poison being one offense, and attempting to give, another, the remoteness or unreliability of the means used, the purpose being well ascertained, can avail the accused nothing.

Such, we think, was the meaning of the Legislature passing the act.

This interpretation of the law is supported by the case of *The Queen* v. *Michael,* 2 Moody's British Crown Cases, 163, in which it appears the prisoner delivered to Sarah Stephens, the nurse of a child, a quantity of laudanum, telling her it was a proper medicine for the child, and directing her to administer to the child, every night, a teaspoonful. It was shown to be the prisoner's intention to kill the child. Sarah Stephens took the laudanum home with her, not intending to give it at all; left it on the mantelpiece in her room, which was in a different house from where the prisoner resided. Some days afterwards, a little boy of Sarah Stephens, five years of age, during the absence of Sarah, administered to the child a much larger dose than a teaspoonful, and the child died in consequence. This was held, we think properly, to be murder on the part of the prisoner.[1]

[1]See Acc., 2 East, 5; *People* v. *Bush,* 4 Hill, 133; *Holloway* v. *Reg.,* Den. & Pierce, 287.

David W. McBean *v.* The State.

The indictment here is a good one; sufficiently describing the offense defined in the statute.

Because of the admission of illegal testimony, the judgment is reversed and the prisoner will be remanded for a new trial.

DAVID W. MCBEAN, in Error, *v.* THE STATE.

1. PLEADING. *Waiver. Replication.* If a defendant in a misdemeanor, go to trial, without a replication to a plea of former conviction, it is a waiver of the defense.
2. SAME. *Practice. Negligence.* Where a plea of former conviction was filed at one term, and no replication was filed, and the trial was had at the next term on a plea of not guilty, affidavits of the defendant, and his counsel who filed his plea, that said counsel was engaged in another court when the trial began, and that defendant, with new counsel, had gone into the trial under the belief that it was another cause against the same party, was held to be no ground for a new trial.
3. GRAND JURY. *Caption of Indictment.* If the facts necessary to show the proper organization of a grand jury, appear, either in the face of the indictment, or in the caption of the record of the court, it is sufficient on motion to quash or reasons filed in arrest of judgment.
4. INDICTMENT. *Oath of Grand Jury.* It is sufficient in an indictment, after showing that the Grand Jury was sworn, to aver that the Grand Jurors, &c., "*do* present and say," without the words "upon their oaths aforesaid."

Cases cited: *Long* v. *State*, 1 Hum., 386; *McClure* v. *State*, 1 Yer., 206, 8 Yer., 514, 9 Hum., 119; *Johnson* v. *State*, M. & Y., 129.

FROM GREENE.

In the Criminal Court. A. W. HOWARD, J., presiding.

David W. McBean *v.* The State.

INGERSOLL, for plaintiff in error.

Attorney General HEISKELL, for the State.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff in error was indicted, at the November Term, 1868, of the Criminal Court of Greene county, for an assault and battery upon one Samuel Lane.

At March Term, 1869, he entered a motion to quash the indictment, which, upon argument, was overruled.

At the July Term, 1869, the plaintiff in error filed a plea of former conviction; and at November Term, 1869, the cause, having been regularly reached, was tried by a jury upon the plea of "not guilty," which resulted in the conviction of the defendant.

A rule for a new trial was entered, and in support of the motion the defendant made an affidavit setting forth that his attorney, J. C. Beeks, had put in the said plea of former conviction for him, upon which no issue had been taken; that when the cause was called for trial said attorney was engaged in the Chancery Court sitting in another room of the Court-house; that James Britton, whom he had employed in the case recently before it was called, put in a plea of "not guilty," and went into the trial of it before his first named counsel returned into the Criminal Court room.

Jas. C. Beeks, Esq., the counsel named, also made affidavit sustaining defendant's statements, and adds that the trial was proceeding when he came into the court room, he was informed the case on trial was for another

assault upon the same prosecutor, and did not discover the mistake until one witness was examined.

The court refused to grant a new trial; thereupon the defendant below filed the following reason in arrest of judgment:

"That the indictment in this case does not show that the grand jurors found the same, upon their oath, as grand jurors," which was overruled by the court, and judgment pronounced; whereupon the defendant appealed in error to this court.

It is insisted that the court below erred in not granting a new trial, for the reasons disclosed in the affidavit of the plaintiff in error and his counsel.

No issue had been taken upon the plea of former conviction, or other disposition made of it at the time at which the cause was called for trial, and the trial was had upon the plea of "not guilty."

The defendant and his counsel were bound to know and to take notice of the pleadings which were on file in the case; and going to trial upon the plea of "not guilty" alone was a waiver of the defense of "former conviction."

The objection taken to the indictment upon the motion to quash, and in the reason in arrest of judgment, is, that it does not show that the grand jurors acted upon oath.

The indictment is as follows:

"STATE OF TENNESSEE, GREENE COUNTY—CRIMINAL COURT, FIRST JUDICIAL CRIMINAL DISTRICT—NOVEMBER TERM, 1868.

The Grand Jurors for the State, being duly sum-

moned, elected, empanelled, sworn and charged to inquire for the body of the county aforesaid, *present and say,*" &c., proceeding in the usual form.

It is insisted that the indictment should recite that the grand jurors, "*On their oath aforesaid, present and say,*" &c.

These words are the commencement of the indictment proper, while the preceding recitals more properly constitute the substantial parts of the English caption, which have by usage become incorporated with and a part of the indictment itself, by our practice: 1 Hum. 388.

In England indictments are found by inferior courts, and transmitted for trial to the Court of King's Bench.

The inferior court sends up with the indictment a formal history of the proceedings, describing the court before which the indictment was found, the jurors by whom and the time and place when and where it was found. This history of the proceedings of the inferior court is called the caption, and is entered of record immediately before the indictment: 1 Bishop on Crim. Pro., § 146; 1 Chitty Cr. Law, 267-8.

Consequently the caption is that part of the record which comprehends the judicial history of the cause to the time of finding the indictment.

In our State the indictment is found in the same court in which the defendant who may be indicted, is tried.

The record of the court at each term shows when and where it was held, who were the grand jurors; that they were "summoned, elected, empanelled, sworn,

and charged," &c., and these facts are always set out in the transcript of the record in every criminal cause brought up to this court from the Criminal or Circuit Courts by appeal or writ of error, and when so sent up constitute what is technically termed the caption of the indictment: 1 Hum., 387; 8 Yer., 514; 9 Hum., 119.

And it has been held that it is not necessary to the validity of an indictment that it should appear in the caption that the jury were sworn if it so appears in the body of the indictment: 1 Yer., 206; 1 Hum., 386.

It was expressly held, in the case of *McClure* v. *The State*, 1 Yer., 206, that the "recital in the indictment that the grand jurors were elected, empanelled, sworn and charged, will be sufficient," even if the caption omit to state they were sworn. And this case was reviewed and approved in the subsequent case of *Long* v. *The State:* 1 Hum., 386.

In the case of *Johnson* v. *The State*, it was objected to the indictment that it did not show that it was found by the oaths of twelve men. The court held that the caption showed that fact, and that it was not necessary to repeat it on the face of the indictment. M. & Y., 129.

We hold that it is necessary that an indictment should show upon its face that it is made upon the oath of the grand jury, and that the averments contained in the one under consideration do sufficiently aver that fact.

Let the judgment of the Criminal Court be affirmed.

HENRY CRIPPEN, in Error, *v.* THE STATE.

Double pleading. Under the Act of 1860, c. 102, allowing double pleading in criminal cases, the several pleas must be put in, so as to be tried at the same time.

Cases cited: *Hill* v. *State*, 2 Yer., 248; *State* v. *Copeland*, 2 Swan, 626.

FROM KNOX.

From the Misdemeanor Court, C. W. JONES, J., presiding.

M. L. HALL, for plaintiff in error.

Attorney General HEISKELL, for the State.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff in error was convicted of an assault and battery on one Lewis Foust, in the County Court of Knox county. The defendant below put in a plea of former conviction under the small offense law, to which the Attorney General replied, and the issue thus made up was submitted to the jury, and a verdict against defendant rendered by them.

Thereupon, defendant entered a rule for a new trial, which was discharged by the Judge. Defendant then asked leave of the Court to file a plea of not guilty, which was refused, and judgment was pronounced upon the verdict of the jury; and defendant tendered a bill of exceptions, and prayed an appeal to this Court.

There was no error in the action of the Court be-

low. Formerly, double pleading was not allowed in criminal cases: 2 Yer., 248; 2 Swan, 626. Now, however, a defendant may plead *autre fois convict*, or former conviction, and he may also enter and rely upon any other plea or pleas that would be a good defense to the indictment: Act of 1860, c. 102, p. 97.

But these pleas should all be relied upon on the same trial, and the privilege of putting in several pleas does not give the right to have a separate trial upon each plea.

Let the judgment be affirmed.

3hei 26
117 455
117 465

JOHN PURKEY *et al. v.* THE STATE.

1. CHARGE OF COURT. *Doubts.* A charge in a misdemeanor case, that the State need not show the parties guilty beyond a reasonable doubt, but that the proof must show the guilt of the defendants to their "reasonable satisfaction," that their best judgments must be that the defendants are guilty, so that the mind may rest easy, in the conclusion of guilt, is not error.
2. DOUBT. *In misdemeanor.* Reasonable doubt applies to misdemeanors, as well as felonies.

FROM HANCOCK.

In the Circuit Court, E. E. GILLENWATERS, J., presiding.

R. M. BARTON, for plaintiff in error.

Attorney General HEISKELL, for the State.

John Purkey *et al.* v. The State.

SNEED, J., delivered the opinion of the Court.

The Court charged the jury in this case, that the State need not show the parties are guilty, beyond all reasonable doubt. This is assigned as error upon the trial of a misdemeanor. In the same connection, however, the Court admonished the jury that the evidence must show the guilt of the defendants to their reasonable satisfaction; that their best judgments must be that the defendants are guilty, so that the mind may rest easy in the conclusion of guilt. With this qualification, we can not reverse the judgment in an offense of this grade for the error in the first proposition. It can not be denied that in the last part of the charge, the Court gave the defendants the benefit of the doctrine of reasonable doubts quite as fully as if the converse of the first proposition had been distinctly charged. The mind of a juror could scarcely "rest easy in the conclusion of guilt," if a reasonable doubt of that guilt remained. This being so in this case, we are still led to the inquiry, whether that humane principle of the common law which forbids a conviction of felony if the evidence generates a reasonable doubt of the guilt of the prisoner, applies as well to misdemeanors as to felonies. There is a large class of misdemeanors, a conviction of which involves an ignominy scarcely less grave than a conviction of felony, in their punishment, as well as the moral degradation which follows such conviction. There are others in which the unlimited power of a jury in the imposition of fines might result in pecuniary impoverishment and ruin. In all criminal accusations, of whatever grade, the presump-

tion of innocence attends the accused from the moment of the first suspicion that has rested upon him, until a jury has pronounced upon his guilt. And out of this presumption has arisen the benignant doctrine that the accused must have the benefit of any reasonable doubt that may exist as to his guilt. And this is a very old and venerable doctrine of the criminal law: *Rex* v. *Stone*, 6 T. R., 528. We can see no reason why this just and humane principle should not apply to misdemeanors as well as to felonies. Indeed, in the ancient authorites, no such distinction is observed. Its application has been distinctly recognized in several of the States, and it could not well be otherwise, since the common law has made no distinction, but declares, in reference to all criminal prosecutions alike, that, "neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient to prove the guilt, unless it generate full belief of the fact, to the exclusion of all reasonable doubt:" 3 Greenl. Ev., 29; 1 Stark. Ev., 478; 1 Hale P. C., 300. We hold that, in all offenses against the criminal laws, cognizable by indictment or presentment, whether felonies or misdemeanors, to authorize a jury to convict, the evidence must be such as to convince them of the guilt of the defendant beyond a reasonable doubt. A reasonable doubt is an honest misgiving as to the guilt of the defendant upon the proof, which the reason entertains and sanctions as a substantial doubt. When, after the evidence, the arguments and the charge have all gone to the jury, and have been thoroughly weighed and considered, the ingenuous and impartial juror, in an honest quest of the

truth, finds himself hesitating and pausing to ask himself if all these things may not be true, and yet this man innocent; and still reasoning upon his doubts, and finding a substantial reason for them all, then we would say the juror entertained such reasonable doubts as would demand an acquittal.

The judgment is affirmed.

THE STATE *v.* L. H. BOWLUS.

1. INDICTMENT. *Perjury.* An indictment for perjury must contain either an averment that the matter sworn to is material, or must show it by averment of the necessary facts. The statement of those facts, as part of the matter sworn to by the defendant, is not sufficient.
2. SAME. *Same. Assignment on affidavit for attachment.* In an assignment of perjury on an affidavit for an ancillary attachment, there must be the averment of materiality, or an averment of the existence of a suit to which the attachment sought was to be ancillary. It seems that if the attachment upon the allegations of the indictment would be wholly void, the assignment of perjury in the oath to obtain it, is bad.

Case cited: *Steinston* v. *State*, 6 Yer., 531.

FROM KNOX.

In the Circuit Court, E. T. HALL, J., presiding.

Attorney General HEISKELL, for the State.

J. R. COCKE, WASHBURN & PROSSER, for defendant.

TURNEY, J., delivered the opinion of the Court.

At the June Term, 1868, of the Circuit Court for

Knox county, an indictment for perjury was preferred and found against the defendant in error. To the indictment is a demurrer, assigning for cause:

1st. That said indictment contains no charge of an offense against the laws of Tennessee.

2d. There is no allegation in said indictment, that the affidavit was made in any material matter or issue.

The Court sustained the demurrer, as we think, properly.

The indictment is predicated upon the written affidavit of the defendant, from which it appears, as recited in the indictment, that he had an action of assumpsit pending in the Circuit Court for Knox county; and desiring to have issued an ancillary attachment, he applied to the Clerk of said Court therefor, and in support of his application filed his written affidavit, the indictment averring that, "The said L. H. Bowlus, being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, then and there, upon his oath aforesaid, before the said E. W. Atkins, Deputy Clerk, as aforesaid; the said E. W. Atkins then and there having a lawful and competent power and authority to administer said oath to the said L. H. Bowlus in that behalf; falsely, corruptly, knowingly, wilfully and maliciously, in and by his said affidavit in writing, did depose and swear, among other things, in substance and to the effect following: that is to say, that he, meaning the said L. H. Bowlus, has heretofore brought a suit which is now pending in the Circuit Court of Knox county, in which he, meaning the said L. H. Bowlus, is plaintiff, and Alexander Ken-

nedy, jr., is defendant, meaning the Alexander Kennedy, jr., above mentioned; that said suit is a civil action, in which he, meaning the said L. H. Bowlus, claims damages to the amount of twelve hundred dollars for trespass on the case, upon promises due by account for work and labor, meaning that the said Alexander Kennedy, jr., was indebted to the said L. H. Bowlus in the sum of twelve hundred dollars for work and labor done by the said L. H. Bowlus, for the said Alexander Kennedy, as in and by the said affidavit of the said L. H. Bowlus, filed in the Circuit Court of Knox county aforesaid, more fully and at large appears."

There are two counts in the indictment. The extract of the affidavit, as above set out, and upon which the charge of perjury, by this indictment, is based, is substantially recited in both. The indictment negatives the indebtedness recited in the affidavit.

By section 4793 of the Code, it is provided that any person who wilfully and corruptly swears or affirms falsely, in any material matter, upon any oath or affirmation required or authorized by law, is guilty of perjury.

Trying the indictment in this case by the provisions above, it is fatally defective. There is no averment of the existence of a suit, in aid of which an ancillary attachment is sought. From the indictment, we know nothing of such suit, except as it appears from the recitals of the affidavit; nor is there any averment of the materiality of the matter alleged to have been sworn to. So far as we are able to see, from this indictment, and

we must confine ourselves to its face, no material matter, required or authorized by law, is sworn to.

The affidavit set out was wholly insufficient to authorize the issuance of an attachment, no causes required by law being stated by it. An attachment issued upon it would have been absolutely void.

Everything necessary to constitute the crime must be averred. If the oath was taken in a judicial proceeding, the proceeding must be sufficiently described and set out to show that the Court had jurisdiction. If taken before a Clerk or other ministerial officer, in aid or promotion of a judicial proceeding, not only must the judicial proceeding be set out, but the oath must be so fully recited as to show that the official administering it was required and authorized by law to administer it for the purposes contemplated in the application or submission to take, or take and subscribe it. Otherwise, as this court said in the case of *Steinston* v. *State*, 6 Yer., 531, "State prosecutions may be supported by intendment."

Judgment affirmed, and prisoner discharged

William Fulkner *v.* The State.

WILLIAM FULKNER *v.* THE STATE.

FORMER CONVICTION. The proper judgment on sustaining a demurrer to a plea of former conviction, is, that the defendant answer over. He may then plead a new or better plea of former conviction, or not guilty, or both.

Cases cited: 9 Hum., 677; 10 *Id.*, 431; 11 *Id.*, 600; 5 Cold., 9; 1 Swan, 34.
Code cited: 4994, 4995, 5001.

FROM KNOX.

M. L. HALL, for plaintiff in error.

Attorney General HEISKELL, for the State.

SNEED, J., delivered the opinion of the Court.

The plaintiff in error was indicted in the Misdemeanor Court of Knox county for an assault and battery. He filed a plea of conviction under the small offense law. To this plea the Attorney General demurred, and the court allowed the demurrer. The grounds of the demurrer were that the plea does not aver that the Justice who rendered the judgment heard any of the evidence, or that any evidence was offered; that the said plea does not show what amount of fine was imposed, or that any was imposed, and that said plea does not show that the party assaulted was notified of the time and place of the trial, or that she was present at the same. Upon the court sustaining the demurrer, the plaintiff in error presented another plea of former conviction containing each of said averments, and also a plea of

not guilty, and asked leave to file the same, which the court refused, and thereupon the court pronounced judgment as on conviction, from which the cause is brought into this court by appeal.

It is insisted on behalf of the plaintiff in error that the court erred in sustaining the demurrer. We do not think so. The Code provides that any person brought before a Justice of the Peace for a misdemeanor may plead guilty, whereupon the Justice shall hear the evidence and fine the offender according to his offense, not less than two dollars nor more than fifty dollars, together with costs. If the charge is of violence to the person of another, the person on whom the violence has been committed shall be notified of the time and place of trial, so that he may attend and be heard as a witness. If the offense merit a fine exceeding fifty dollars, or fine and imprisonment, or imprisonment alone, then the Justice shall not render judgment, but bind the offender over to court: Code, 4994, 4995, 5001. The act known as the small offense law thus carried into the Code, was passed in the year 1848, and though intended to facilitate and render more speedy and certain the punishment of minor offenses, yet this court has had frequent occasion to criticise its abuses and perversions, permitted, if not connived at, by pliant officers of the law. The object of the statute was not to give impunity to the offender, nor to lesson his merited punishment, but to quicken and ensure the same while it diminished the burthens of the courts, and in many cases protected the country from the expenses of protracted litigation. The offender must be

arrested in good faith and brought before the Justice. He may or may not plead guilty. If he pleads guilty, the advantage he obtains under the law is not a light and trifling fine; but he is not to be bound over to court unless the Justice thinks the offense merits imprisonment or a larger fine than fifty dollars; but within that limit he is to be fined "according to the aggravation of his offense." In too many cases the Justice seems to think that because the defendant pleads guilty, even in an aggravated case, he is to be dealt with tenderly and have but a nominal fine imposed upon him. This is a gross abuse of this law, and such abuses for more than twenty years, have been most prolific of disorders.

It has been frequently held that any fraud upon the law will avoid any conviction under it so far as to render the party liable to another trial for the same offense, and we but reiterate the uniform doctrine of this court upon this subject: that no plea of *autre fois convict* under this law will avail as a protection against an indictment for the same offense, unless the plea shows that in every particular the law was complied with—or, if in any respect it was not, unless a good reason is stated why it was not. We hold, therefore, that the demurrer to the plea was well taken, on the grounds stated: *Vide* 9 Hum., 677; 10 *Id.*, 431; 11 *Id.*, 600; 5 Cold., 9; 1 Swan, 34.

It is further insisted that the court erred in refusing to allow the plaintiff in error to file his new amended plea of *autre fois convict*, and his plea of not guilty, after the demurrer to his first plea was sustain-

cd. In this action of the court we think there was error. The act of 1859–60, c. 102, provides that when any defendant to any prosecution in this State shall enter the plea of former conviction, he shall not be debarred thereby of the right to enter or rely on any other or as many other pleas as would be a good defense to the indictment. In the case of *The State* v. *Eppes*, 4 Sneed, 552, determined before the passage of the act of 1859–60, it was held, that where the defendant relied upon the plea of former conviction under the small offense law—and an issue involving the legality of the proceeding before the Justice is found against the defendant—the proper practice is for the court to proceed to judgment as upon conviction. This doctrine stands upon the reason that the plea of former conviction in such case, is but a confession of guilt upon the record, as the jurisdiction of the Justice is restricted to those cases alone in which the defendant may plead guilty, and the plea of *autre fois convict* disclosed the fact that the defendant did in fact plead guilty. This case, however, is different. The demurrer of the State attacks the validity of the plea upon technical grounds; and upon sustaining the demurrer the defendant had a right to file his amended plea or his plea of not guilty, either or both.

In disallowing the motion of defendant there was error; for which judgment is reversed and the case remanded.

3hei 37
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ANDY WILLIAMS v. THE STATE.

1. VENUE. *Indictment need not state.* Venue need not be averred in an indictment for a capital offense: Code, 5125. It is sufficient if the proof show the offense to have been committed in the county.
2. LAW COURT OF CHATTANOOGA. *Grand Jurors in Circuit Court.* The Act establishing the special court at Chattanooga, does not disqualify citizens of the districts, over which it has jurisdiction, from serving as jurors, grand or petit, in the Circuit Court.
3. INDICTMENT. *Murder in first degree.* An indictment for murder in the first degree need not use the words "murder in the first degree." If it use the descriptive words essential to the offense, it is good.
4. SAME. *Form of.* Form of indictment held sufficient.

Cases cited: *Bonds* v. *State*, M. & Y., 146; *State* v. *Alderson*, 10 Yer., 523.
Code cited: 5125.

FROM HAMILTON.

This was an indictment in the Circuit Court of Hamilton county, tried before W. L. ADAMS, J.

The indictment was in these words:

"State of Tennessee, Hamilton County, Circuit Court, February Term, 1868.—The grand jurors for the State, upon their oaths, present that Henry Williams, alias Andrew Williams, alias Andy Williams, colored, on the fifth day of November, 1867, in Hamilton county, aforesaid, did feloniously and of his malice aforethought, assault Adolph Deutch, and then and there willfully, maliciously, deliberately and premeditatedly, did kill and murder the said Adolph Deutch, by striking and beating him on, over and against the head, with a stick, club or bludgeon, in the hands of the said Henry, alias Andrew, alias Andy Williams, thereby inflicting upon the head

of the said Adolph Deutch mortal wounds and injuries, of which he then and there died, against the peace and dignity of the State.

"A. A. HYDE, Attorney General."

A. CALDWELL, W. P. WASHBURN and J. R. COCKE, were assigned to defend the prisoner.

An elaborate brief of NELSON, J., for the prisoner, was filed by the counsel, in which he contended that the indictment was bad under Code, 5114 to 5138, which were intended to simplify and not to destroy indictments. That the sections were suggested by 7 Geo. IV., and 14 and 15 Vict., quoted in Sharsw. Bl., Bk. 4, p. 306, n. Legislature can not abolish indictments, Const. U. S., Art. V. of Amendments; Const. of Tenn., Art. 1, s 14; Ch. J. Marshall, in Burr's trial, 306, 309. Forms existing when these constitutions were formed, must be preserved; 1 Ch. Cr. Law, 168 to 174, m.; 2 Sharsw. Bl. Com., Bk. 4, pp. 301 to 306, and notes.

Law Court of Chattanooga, Code, 122, had jurisdiction of 4th and 14th civil districts of Hamilton county; extended by Act of 1868, c. 36, ss 2 and 3, pp. 39, 40, to (perhaps) parts of 5th and 17th. Jurisdiction civil and criminal; Code, 4272 to 4275. No resident of said districts shall be indicted in Circuit Court, unless offense committed outside of district. Offense must be charged and proved to have been done outside of this jurisdiction, and grand jury must come from beyond jurisdiction; Citing *McBride* v. *State*, 10 Hum., 615; *Morton* v. *State*, 2 King's Dig., § 4926; *Hite* v. *State*, 9 Yer., 357; Code, 4277–8.

As a common law indictment, it is defective; omits

"willfully," 3 Ch. Cr. L., 751, m. Assault should be charged: "did make an assault; word "feloniously" omitted in the charge of killing; the words "stick, club or bludgeon" are in the disjunctive. The length and depth of the wound not stated; whether he died instantly or after languishing, not stated; nor words, "so defendant did feloniously kill and murder:" 2 Ch. Cr. L., 487 to 492, top, 734 to 739, m.; *Whiteside* v. *State*, 4 Cold., 183.

Not statutory, because it should charge that the kill ing was done feloniously, willfully, deliberately and premeditatedly. Does not conclude against the form of the statute.

HEISKELL, Attorney General for the State, insisted that it was not necessary to show by the record that the grand jury came from without the jurisdiction of the Law Court. *State* v. *Alderson*, 10 Yer., 523; *Bonds* v. *State*, M. & Y., 143, 147.

Want of qualification must be pleaded in abatement: *State* v. *Bryant*, 10 Yer., 527; *State* v. *Duncan*, 7 Yer., 271; *Bennet* v. *State*, M. & Y., 133, 135; Meigs' Dig., p. 383.

There is no exclusion of jurisdiction, unless the offense is committed by a citizen of the special jurisdiction.

NELSON, J., having been of counsel for the prisoner on a former appeal, did not sit in this case.

NICHOLSON, C. J., delivered the opinion of the Court.

At the February Term, 1868, of the Circuit Court for Hamilton county, sitting at Harrison in said county, Andy Williams was indicted for the murder of Adolph Deutch.

Williams *v.* The State.

The indictment charges that the prisoner did feloniously, and of his malice aforethought, assault Adolph Deutch, and then and there willfully, maliciously, deliberately and premeditatedly kill and murder the said Adolph Deutch, alleging that the murder was committed in Hamilton county. At the February Term, 1870, the defendant was tried by a jury of Hamilton county, and found guilty of murder in the first degree. After a motion for a new trial was discharged, defendant's counsel filed the following reasons in arrest of judgment: First, That the record does not show that the indictment was found and returned into court by a grand jury, duly elected and impanelled according to law. Second, That the record does not show, that the grand jurors were selected and impanelled, from that portion of Hamilton county over which this court has jurisdiction. Third, That there is no averment in the indictment, that the murder was committed in that portion of Hamilton county over which the court has jurisdiction. Fourth, That there are no sufficient charges in the indictment to constitute murder in the first degree. Fifth, That the offense of murder in the first degree is not charged in the indictment. The reasons in arrest of judgment having been overruled, the court pronounced judgment of death upon the defendant. From this judgment defendant appealed to this court, and tendered his bill of exceptions. The first question is, was there error in the court, in overruling the motion in arrest of judgment? We think not. As to the first reason assigned, the record shows, that the sheriff returned into court the writ of *venire facias* executed upon twenty-five good and lawful citizens of Hamilton county, and, that from the

jurors so summoned, the court proceeded as the law directs, to select and impanel the grand jury. This is all regular.

As to the second reason—the record shows, that the grand jury was composed of good and lawful citizens of Hamilton county. The words "good and lawful" men comprehend every necessary qualification in such case prescribed by law: *Bonds* v. *The State*, Mart. & Yerg., 146; *The State* v. *Alderson*, 10 Yerg., 523. But it was not necessary to aver in the indictment, that the offense was committed in that portion of Hamilton county over which the court had jurisdiction: Code, 5125.[1] It is only necessary, that the proof shall show that the offense was committed within the jurisdiction of the court. This fact is fully shown by the proof. Besides—the act, establishing a special Common Law and Criminal Court at Chattanooga, with jurisdiction over civil districts Nos. 4 and 14, does not disqualify the citizens of those districts from being competent jurors, either grand or petit, in the Circuit Court for the county, holden at Harrison.

As to the fourth reason, the indictment charges that Andy Williams "did feloniously and of his malice aforethought, assault Adolph Deutch, and then and there willfully, maliciously, deliberately and premeditatedly did kill and murder the said Adolph Deutch," etc. This charge is in the language of the Code, 4598, defining the crime of murder in the first degree, and is therefore sufficient.

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[1] See *State* v. *Donaldson*. *Post*, 48; *State* v. *Quartemus*. *Post*.—

As to the fifth reason—it is the same in substance as the fourth, and is for the same reason untenable. The indictment is remarkable for its conciseness and brevity, but it contains every essential ingredient of a good indictment for murder in the first degree. The motion in arrest of judgment was, therefore, properly overruled.

It is next insisted for the prisoner, that a new trial ought to be granted, because Henry Deutch was allowed to detail a conversation he had with the prisoner in the jail, soon after his conviction and sentence on a former trial, in which conversation he confessed, that he had killed the deceased, and detailed the manner of the killing and his motives. This evidence does not seem to have been objected to on the trial, and, it appears further, that witness testified, that the confession was made freely and not under the influence of threats, or fear, or any inducements offered to the prisoner to confess. It is not insisted here that this evidence was not competent, but that in view of the circumstances under which the confession was made, and in favor of life, the court should hold, that it ought to have been excluded by the Circuit Judge from the jury. We have felt the force of these suggestions, and have therefore felt it our duty to scrutinize the entire proof with special care, to see, if, without this evidence, there is any ground, on which to doubt the correctness of the verdict. After the most anxious scrutiny we have been unable to discover any reason for supposing, that this proof made the guilt of the prisoner more certain, than it was without. In this view, therefore, as the proof was competent and not ob-

jected to, we see no error in the refusal of the court below to grant a new trial, nor do we see in it any ground on which we can set aside the verdict.

The only remaining question is, whether the verdict of the jury is sustained by the proof. It appearing by the testimony of G. Berry, a jail guard, that the prisoner had been convicted of stealing watches, from the jewelry store of the deceased, and had been sentenced to be confined in the prison at Chattanooga for twenty days. After he had been in prison several days, he told one of the guard several times, that two of Deutch's watches were hid near Bird's Mill, and if they would go with him, he would show where they were. Witness told Deutch of this two or three times, and advised him to go and get them. Henry Deutch, brother of the deceased, proved, that his brother and himself were informed, on some two or three occasions, by one of the jail guard, that the prisoner stated that two of the stolen watches were hid near Bird's Mill, five or six miles from Chattanooga, and if witness or his brother, would go with him, he would show where they were. On the 5th of November, 1867, deceased told witness he would go. This was when prisoner's term of imprisonment lacked eight days of being out. Deceased got a pair of gloves and comfort, and witness' coat to wear as an overcoat and a navy revolver, and started, saying he would be back by 3 o'clock. All the chambers of the pistol were loaded. Witness exhibited before the jury the gloves, comfort and coat of witness, (a black one with velvet collar,) and a pair of pants, boots, coat and hat, which he stated the deceased had on when he left that

morning; also the pistol. The next morning witness went in search of his brother, and found him dead about five miles from Chattanooga, lying near the road, with two or three wounds on his head, his skull broken in the back of his head, and his body stripped of both coats, his pants, and boots. A stick or wagon standard was lying near, with blood on the larger end. He saw the defendant when he was brought into Chattanooga, four or five days after the killing, and he had on the pants, boots, coat and hat which deceased wore away. The deceased was killed in the 5th civil district of Hamilton county. Witness stated, that after prisoner had been tried before and convicted and sentence pronounced, witness went to the jail. He wanted to know of the prisoner how his brother died; whether he died quick or whether he struggled; and the prisoner told witness, that his brother was going before and he was behind, and his brother was whistling a tune, when he first struck the deceased on the side of the head, and the deceased then turned to draw his pistol, and the prisoner then struck him again on the back of the head, and he fell dead on his face. The prisoner then said, he killed the deceased because he had sworn a lie against him about the watches. No inducements or threats of any kind were used or offered to the prisoner to induce the statements. Witness just told him he was not armed, or going to do any thing to him. He only wanted to know, how his brother died. Majors, the jailor, and several others were present when he and the prisoner had this conversation. He does not recollect the names of any of the others who were present, but

a person named Avery. Don't know where Avery is. Majors is here as a witness for the State, under the rule.

Wm. Rogers thought the wagon standard shown to him was made by himself—it was of white oak and a deadly weapon—he missed one of the standards out of his wagon, which stood on the road side near his house, about a mile from where Deutch was killed.

J. D. Blackford testifies, that he found the body of the deceased on the morning of the 6th of November, 1867, in the 5th civil district of Hamilton county, about five miles from Chattanooga, stripped of all clothing except his shirt, vest, slips and socks. His skull was broken towards the back of his head. There was the appearance of the body having been dragged some eight or ten feet into the bushes on its face. The stick or standard shown witness was lying near the body and had blood on it.

John Majors, the jailor, does not remember such conversation as that stated by witness Deutch, as having taken place in his presence. He might have remembered it and he might not. His recollection was as good as that of common men.

J. M. Conner lives about five miles from Chattanooga, and in about a mile of Bird's Mill. On the day before he heard that Deutch was killed, about 10 o'clock, Deutch and the prisoner stopped at the gate and inquired the way to Lovingood's. Witness shewed him, and Deutch said to the prisoner: I knew it was not that way, pointing across the bottoms, in another direction. Deutch said to the prisoner, come, let's go, and started, and the prisoner started. Deutch went before and prisoner behind,

some three or four steps apart. Prisoner had a stick in his hands, which looked like a wagon standard and looked like the one exhibited to witness.

Lucinda Low, colored, testifies, that on the day before she heard of the killing of Deutch, she met prisoner in the road, about a mile from Lovingood's—she did not know him—but thinks the prisoner is the same one. He had on a dark colored coat, like the one exhibited to her with the velvet collar. He had a pair of black pants on his arm, and a pair of boots in his hand. He had on a dirty shirt and an old pair of shoes.

A. B. Conner testifies, that as a sheriff he went to hunt the prisoner, on the second day after Deutch was killed. He came in view of a cabin door, and saw the prisoner come out of the door—he knew him and he started to run to a thicket. He saw the prisoner plain, and he had on the hat, coat and pants of the deceased. He had seen the deceased wear them and recognized them. When the prisoner was captured, a few days afterwards, he had on the hat, coat, pants and boots, of Deutch. The place, where he saw the prisoner run from, was about two and a half miles from where deceased was found and was in the edge of Georgia. Soon after the prisoner was arrested, he told witness he had killed Deutch, and that he did it to get his clothes and get away.

Upon this evidence, with or without the confessions of the prisoner made to Henry Deutch, immediately after his first trial, his guilt is placed beyond any reasonable doubt. No hypothesis can be made consistent

with his innocence. The proof discloses a deliberate scheme to induce the deceased to go with him in search of the watch, and, as the sequel shows, for the purpose of taking his life. It shows deliberate and premeditated preparation for the deed, in securing the wagon standard, shown to be a deadly weapon, as he passed along the road. His felonious intent was freely avowed to the sheriff. He was met immediately after the murder on the same day, and near the place, with the coats, pants, hat and boots of the deceased. He was seen soon afterwards by the sheriff with the same clothing on, and when arrested he was dressed in the clothes of the deceased. He admitted to the sheriff soon after his arrest that he had killed the deceased to get his clothes and to get away. Here is clear and uncontradicted proof that the prisoner did the killing, and that he did it willfully, maliciously, deliberately and premeditatedly. The confession made, after his first trial, makes his guilt no clearer or more certain than it was made without that proof. There was no error in the court below in refusing a new trial.

The judgment of the court below is therefore affirmed.

The State *v.* Robert Donaldson.

THE STATE *v.* ROBERT DONALDSON.

1. JURISDICTION. *New county. Offenses before creation of.* If a county is divided, and a portion of its territory goes into the formation of a new county, a criminal act done before the division, within the ceded territory, can be prosecuted only within the new county.
2. SAME. *Venue.* The charge, as to place, may state the offense in the new county.
3. VENUE. TIME. *Need not be charged.* Time and place of committing an offense need not be stated in an indictment unless they are material ingredients of the offense.

Code cited: 5124, 5125.

Case cited: 1 Cold., 380.

FROM LOUDON.

Appeal from the judgment of E. T. HALL, J., presiding in the Circuit Court.

Attorney General HEISKELL, for the State, cited Bishop's Cr. Law, 552, and cases there cited. He admitted that the better ruling would be to retain the jurisdiction in the old county, as the other would perhaps interfere with pending prosecutions.

GEO. BROWN, for the defendant, insisted that it would be a departure from the Constitution to try a defendant in the new county for an offense committed in the old.

Attorney General in reply, said that the spirit of that provision was, to try by a jury of the vicinage, who must in part, and might all, be cut off into the new county.

The State *v.* Robert Donaldson.

DEADERICK, J., delivered the opinion of the Court.

At the September Term, 1870, of the Circuit Court of Loudon county, an indictment was found against the defendant in error, for carnal knowledge of a female under the age of ten years.

The indictment charged that the offense was committed in the county of Loudon, on the 10th day of March, 1868, a time anterior to the passage of any law authorizing the establishment of said county, and of course before the organization or existence of said county.

On motion of the defendant, by his counsel, the indictment was quashed by the Circuit Judge, and thereupon the District Attorney excepted to the action of the court, and appealed, on behalf of the State, in error, to this court.

The time when the offense was committed being alleged in the indictment to be the 10th of March, 1868, two questions are presented for our determination:

1. Upon the motion to quash, are we to presume the time laid in the indictment as the time when the offense was committed, to be the true time?

2. If we are to take the time alleged in the indictment as the time when the offense was committed, had the Circuit Court of Loudon county, jurisdiction to try the offender?

The county of Loudon is constituted of parts of the counties of Blount, Roane and Monroe; and at the time when the offense is alleged to have been committed, these counties had and exercised jurisdiction over the parts of their territories since taken from them, respectively, to form the new county of Loudon.

The State *v.* Robert Donaldson.

At common law it is necessary, with some exceptions, to aver in the indictment the day of the month, and year, when the offense was committed. If the time stated is repugnant, uncertain, or impossible, or if no time at all is stated, so that it does not appear whether the offense is barred by limitation, the indictment will be bad, and judgment upon it will be arrested.[1] If a time is limited by law within which the offense charged must be prosecuted, the indictment must show upon its face that it was found within such time: Whart. Am. Cr. L., 111, 114; Arch. Cr. Pl. and Ev., 275; 1 Ch. Cr. L., 179. Such we understand to be the rule of the common law.

But these well-established rules of criminal pleading of the common law, seem to have been materially changed by section 5124 of the Code, which provides, "that the time at which the offense was committed need not be stated in the indictment; but the offense may be alleged to have been committed on any day before the finding thereof, or generally before the finding of the indictment, unless the time is a material ingredient of the offense."

In this case, the offense might have been committed on one day as well as another, and the time or day of its commission is not of the essence of the offense; and according to the above quoted section of the Code, it was not necessary to allege any day certain, as the day upon which the offense was committed. By the rules of the common law, the indictment should also allege the place of the commission of the offense charged. But this re-

[1] See *State* v. *Bowling*, 10 Hum., 72.

quirement of the common law has been dispensed with by section 5125 of the Code, which provides that "It is not necessary for the indictment to allege where the offense was committed; but the proof shall show a state of facts bringing the offense within the jurisdiction of the county in which the indictment was preferred."[1]

The indictment was preferred in the county of Loudon, and the proof must show, upon the trial of the cause, that the offense was committed in that county; and the offender can be tried under article 1, section 9, of our Constitution, only in the county "in which the crime shall have been committed," unless he shall waive this right secured to him, by consenting to a change of venue: 1 Cold., 350. A grand jury can not inquire concerning any offenses except those committed within their county; and if a county is divided, and a portion of its territory goes into the formation of a new county, a criminal act done before the division of the old county, within the ceded territory, for which the offender had not been convicted and punished, can be prosecuted only in the new county. The offense committed is against the State. It is the State that makes the accusation, and prosecutes the offender; and a new county being formed, including the place of the commission of an offense, and a court having criminal jurisdiction being established therein, such court acquires jurisdiction of all violations of law within the limits of such new county. After its establishment, the Circuit Court in the old county from which the territory was taken, upon which the offense

[1] See *Williams* v. *The State*, *ante* 37; *State* v. *Quartemus*, *post* 65.

was committed, has no jurisdiction to institute an indictment against the offender. But such proceedings must be begun in the county where the offense was committed: 4 Bl. Com., 303; Arch. Cr. P. & E., 280, 281; Bishop on Cr. Pro., 65, 66 and notes; Bishop Cr. L., 552.

In 1842, part of the county of Burke, and part of Rutherford county, North Carolina, were constituted a new county, and jurisdiction given to the Superior Court of Burke county of all criminal offenses committed in the part of McDowell which was taken from Burke. It was held that an indictment for an offense alleged in the indictment to have been committed in Burke, could not be supported by evidence of acts done in McDowell, after the establishment of the latter county: 4 Ire., 219.

In Arkansas, it has been held that, "if a new county is formed of territory formerly included in an old county, an indictment for an offense antecedently committed within the territory embraced in the new county, may be maintained in the new, under the usual allegation setting out the offense as committed in the new: 13 Ark., 708.

The same doctrine was declared in a New Jersey case, except that while it was held that the trial should be in the new county, it was also held that the indictment should not allege that the offense was committed in the new county, for the reason stated, that "it is seen that at the time mentioned there was no such place as that at which the offense is alleged to have been committed:" 3 Halst., 307.

In Georgia, also, it has been held that the offender should be tried in the new county, and that the offense

might be, or should be, charged as having been perpetrated in the old county: 22 Ga., 545, 555.

Thus it will be seen that the trial of the offender should be had in the county in which the place where the offense was committed, is included at the time of the trial. This being so, we further hold that it is sufficient to charge the offense in the indictment as having been committed in the new county including the territory upon which it was committed. It follows, therefore, that his Honor, the Circuit Judge, erred in quashing the indictment in this case; and the judgment will be reversed, and the cause will be remanded to the Circuit Court of Loudon county for further proceedings; and the defendant will be recognized to appear at the next term of the Circuit Court of Loudon county, to answer to the indictment.

R. H. Defrese *v.* The State.

1. Larceny. *Possession obtained by fraud.* Obtaining property by a fraudulent device, as "the five cent trick," is larceny.

2. Same. *Bailment or Agency.* The Code, 4679, which makes it larceny to use any bailment or agency merely as the means of procuring possession of property, with an intent at the time, to make a fraudulent appropriation thereof, is only a return to the principles of the common law.

3. Evidence. *Substantive felony, to prove guilty knowledge.* Evidence of

other acts of a prisoner may be admitted where a guilty knowledge is to be proved, though they amount to substantive felonies or attempts to commit felony.

Code cited: *Britt* v. *State.* 9 Hum., 31.

FROM KNOX.

In the Circuit Court. E. T. HALL, J., presiding.

The indictment upon which the prisoner was convicted was in the common law form.

HEISKELL, Attorney General for the State, cited Roscoe, Cr. Ev., 569, 576–7, m.; 2 Whar. Am. Cr. Law, §§ 1849, 1787; *State* v. *Long*, 1 Hay., 154; *Felter* v. *State*, 9 Yerg., 397, 404, decided in 1836; and insisted that the Code 4678, 4679, restored the old rule of the common law; that in returning to the old rule the mode of proceeding was revived; that the statutes declared the act larceny, and evidently they meant that it should be so described, and so *Hall* v. *The State*, 3 Cold., 138, was a misapprehension of the statute. On admission of proof of substantive felony, he cited 1 Wat., Archb., 392, *et seq.*, 395; *Butt* v. *State*, 9 Hum., 31, 38; *Perdue* v. *State*, 2 Hum., 494.

E. C. CAMP, for prisoner, contended that there must be a trespass to constitute larceny, citing 1 Bishop, Cr. L., § 427; 2 *Id.*, 845, 816, 819; *Felter* v. *State*, 9 Yerg., 397. That the indictment does not charge a statutory larceny under the Code, 4678, 4679; *Hall* v. *State*, 3 Cold., 128. Evidence of substantive felony to prove *scienter*, 2 Russ on Cr., 772.

R. H. Defrese *v.* The State.

WM. H. MAXWELL, with him, cited, in addition, *State* v. *Braden*, 2 Tenn., 68; *Robinson* v. *State*, 1 Cold., 120; *Dodge* v. *Brittain*, Meigs, 84.

SNEED, J., delivered the opinion of the Court.

The prisoner and one J. H. Smith were indicted in the Circuit Court of Knox county for the crime of robbery. They were both convicted of grand larceny, and adjudged to confinement in the Penitentiary for five years. The prisoner appealed in error. On the 8th of January, 1869, the prosecutor, James P. Johnson, a citizen of Union county, was in the city of Knoxville. About noon of that day, he started out of the city in his wagon, and had reached a bridge near Ingles' mill when the defendant Smith came up to the wagon and asked permission to ride, which was given, and in a few moments, the prisoner Defrese, came up and also wanted to ride. The prosecutor observed that he would have to stop on top of the hill to wait for his brother, but gave his permission also to the prisoner to get into the wagon, which he did. Both of the defendants were strangers to the prosecutor, and he states in his testimony that, "from their looks," he was afraid of them. He, however, drove on, with one sitting on either side of him, until they reached the railroad, when the defendant Smith asked him if he had a pistol, to which he replied in the negative. At this moment Smith got out of the wagon and appeared to be taking something out of his pocket. He walked in the direction of some houses near by and disappeared behind them. The prisoner remarked that

Smith had dropped something. The wagon was stopped, and the prisoner picked up from the ground a paper folded in the shape of "a thumb paper," and remounting into the wagon, he opened the paper and took from it a five cent coin, which he put into his mouth, and then refolded the paper as before. About this time the party had reached the top of the hill; where the wagon was halted. Here Smith came up, and the prisoner observed to him that he had lost something, at the same time handing him the folded paper. The defendant, Smith, replied, "Oh, yes, I would not take ten dollars for that paper," and proposed at once to bet ten dollars that there was a five cent piece in the paper. The prosecutor replied that he did not wish to bet, and that he had no money. He was then asked by Smith to show his watch. The prisoner and Smith both examined the watch, then handed it back, and the prosecutor replaced it in his pocket, observing that it was worth forty dollars. The defendant, Smith, proposed to bet twenty-five dollars against the watch; but the prosecutor "had fears of them," as he says, and was not willing to bet. An offer was then made by Smith to bet forty dollars against the watch that there was a five cent coin in the folded paper. The prisoner, Defrese, at this time, says the prosecutor, "kept winking his eye at me." At this time Smith and the prisoner had alighted from the wagon, and were standing by it. The prosecutor was sitting in the wagon. He states that he was afraid of the men, and unfastened his watch and handed it to the prisoner; but, to use his own words,

"it was to be no bet until Smith put up forty dollars in Defrese's hands." The defendant, Smith, then took out a pocket book, and, without showing any money, handed it to the prisoner. The defendant, Smith, then tore open the paper, exhibited a five cent coin which had been concealed in it, "snatches his own pocket book and the watch from Defrese, and walked off." The prosecutor besought him to come back; but he replied that he had shown the prosecutor the Yankee trick, and walked on. The prisoner remained with the prosecutor a few minutes, then left him, saying that "he would go and get Smith to return the watch." It does not appear, however, that the prosecutor ever saw the prisoner again until he confronted him as his accuser. It was shown that soon after the departure of the defendants, two persons rode up to the wagon of the prosecutor, who seemed to them frightened and afraid of them. They assured him they were his friends, and he gave them a narrative of his troubles, and they at once went in pursuit of defendants. One of these persons states that he had seen the prisoner and Smith walking along the road before they came up with the prosecutor, and on the same day they had attempted the same trick upon the witness. The defendant, Smith, had "dropped the card" in the same way, and Defrese had picked it up and taken out the coin, and wanted the witness to bet Smith that there was no coin in it. He also stated that he saw the prisoner attempting the same thing some days before. Another witness stated that he saw these two defendants, on two different occasions, two

weeks before, arranging some cards for a like operation. According to the witness, the process is simple. A card is split open to the center on one side, and a five cent coin inserted; the card is then folded up with another coin enclosed. The office of one of the confederates is to drop the card, as if casually, in the presence of the victim, and then to turn away, while the other picks it up, opens it, and takes out one of the coins, and then refolds it, all in full view of the victim. On the approach of the other, he claims the package, and at once offers to bet that there is a five cent coin in it. The victim, having seen the coin taken out, is easily entrapped. "'Tis a mere gambling trick," said the witness; "there is nothing like robbery or larceny about it, more than any other gambling trick."[1]

[1]It would seem strange, if in the multiform devices of evil disposed persons to commit crime, and yet evade the law, some transaction, analogous to this, has never come before the courts for judgment. Every precedent, says Lord Coke, must have a beginning, but when authority and precedent are wanting there is need of great consideration before anything of novelty is established. 2 Camp. Lives, Ld. Ch., 209.

But this kind of case is not altogether without precedent in the courts of this State. The case of *Enos* v. *State*, tried and determined at Jackson in 1853, was not reported, but is well remembered. The facts of that case, as to the artifice used, were almost identical with those of this case, except that two pearl buttons were used instead of silver coins, and a small round box, of curious construction, called the Mexican ball, was used instead of a folded card. It requires two persons, apparently strangers to each other, and meeting casually, as in this case, to perform the operation. The prosecutor, a credulous countryman, fell an easy victim. One of the parties, while the other was looking away, touched a spring, opened the box, and took out a pearl button in full view of the prosecutor. The other, then advancing, offered to bet there was a button in the box. The prosecutor was induced to lend the party who had taken out the button a considerable sum to bet on it, and took out his pocket book with that view, and proceeded to count

The law does not so regard it. On the contrary, the law would hold the secret theft an innocent sport, rather than an adroit artifice concocted to evade its penalties, and so well calculated to subserve the ends of felony and fraud, when attempted on the credulous and unwary.

It is denied at the bar that the transaction is larceny, either at common law or under statutory modifications of the common law doctrine.

It was a remark of Baron Parke, that the definitions of larceny were none of them complete: 3 Greenl. Ev., 150. He objected to that of Mr. East, because he did not define the meaning of the word felonious. It is the doctrine of the common law, that the essence of the offense is that the goods be taken against the will of the owner; *invito domino;* Foster, 123. And for more than three score years the courts of this State have accepted as the law the opinion of Judge Haywood in the case of *The State* v. *Long*, 1 Hay., 154, that, to constitute larceny there must be a trespass in the taking. In that case, it appears that the Judges were equally divided upon the question, whether borrowing with intent to steal will support a charge of larceny. And this query was left in that case to stand for an answer: "Is a trespass in the taking an essential ingredient in the offense?" 2 Batt. Dig., 842. Judge Haywood, who was said by C.

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out the money. At this instant the other party showed the other button, seized the money and walked off with it, while his confederate remained for a few moments with the bewildered countryman, and consoled him by denouncing the outrage, and giving free utterance to his sympathy and indignation. Only one of the parties was arrested, and he was convicted of robbery, which, upon appeal to this court, was affirmed. SNEED, J.

J. Henderson to be the greatest criminal lawyer of his time, answered that inquiry in a note to the case of *The State* v. *Long*, and such has been held to be the law in this State ever since, except as it has been modified by statute. As Baron Parke regretted that Mr. East did not define the word felonious, so, perhaps, it may be matter of regret that Judge Haywood did not define what course of conduct would constitute the kind of trespass which is an essential element in larceny, and whether or not it is to be restricted to the sense of the violation of another's possession in the common sense of those terms. The books abound in cases where the goods were parted with willingly, and there was really no trespass in the taking, in the sense in which that term is commonly used. And yet the law raises a constructive trespass in all such cases, as in the case cited by Greenleaf, 3 Greenl. Ev., 160. "A felonious intent," says he, "may be proved by evidence that the goods were obtained from the owner by stratagem, artifice or fraud." And he calls attention to an important distinction to be observed between the crime of larceny and that of obtaining goods by false pretenses, and cites two cases in illustration, where the same fraudulent means were used by the prisoner to obtain possession of the goods in two separate cases. In the one case the owner intended to part with his property, absolutely, and to convey it to the prisoner; but in the other, he intended only to part with the temporary possession for a limited and specific purpose, retaining the ownership in himself; the latter case alone would amount to larceny, the former constituting only the offense of obtaining goods by false pretenses. Thus,

the same distinction is observed in all the old authorities. Where the possession alone, and not the right of property, is obtained by fraud or other illegal means, accompanied by the felonious intent, it is larceny: 2 East P. C., 685; *Rex* v. *Charwood*, 1 Leach, 212; 2 Russ. on Cr., 113, 127.

There are many other cases in which the owner parts willingly with the possession of his goods, in some manner of bailment; and a fraudulent conversion by the bailee is held to be larceny. The essence of the offense in that class of cases being the fraudulent purpose at the time of the bailment, the trespass is in the fraud and deception practiced upon the owner, by which the possession was acquired with felonious intent. The owner has parted with the possession of his goods, perhaps willingly, and hence no trespass, in its narrow and restricted sense, is committed. But when it is made apparent that some stratagem or artifice has been fraudulently used to acquire the possession; that the owner did not, in fact, part with his goods willingly, to be fraudulently appropriated by the bailee, then the crime is complete. This is a wrong, a trespass, a violation of the possession. Thus it is said that the taking and carrying away are felonious where the goods are taken against the will of the owner, either in his absence or in a clandestine manner; or where possession is obtained either by force or surprise, or by any trick, device or fraudulent expedient, the owner not parting with his entire interest in his goods; and when the taker in any such case intends fraudulently to deprive the owner of his entire interest in the property against his will: Rosc. Cr. Ev.,

586. Applying these principles to this case, we can see no escape for the prisoner, even upon the principles of the common law, independent of the peculiar statute of our State. In the language of Mr. Att. Gen. Heiskell, it is at last but a return to the ancient principles of the common law. The statute makes it larceny to use any bailment or agency merely as the means of procuring possession of property, with an intent at the time to make a fraudulent appropriation thereof: Code, 4679. We think all the elements of larceny under the law exist in this case. We have examined this case very carefully, indeed, hoping that there might be some door of escape for the prisoner, upon the law and the facts, as he is yet a young man, and perhaps capable of some industrial art, in which a life of honorable toil might have redeemed his good name. But thus we find the law, and thus it is our duty to declare it.

It is urged on behalf of the prisoner, that the Court erred in admitting evidence that the prisoner and Smith were seen on several occasions attempting to practice upon others the same artifice practiced upon the prosecutor. We think the proof in this kind of case was legitimate and proper. The combination between the parties, as shown in the proof, may be classed as a conspiracy to cheat and defraud whoever may be cheated, or whoever they might find an easy victim to their artifice. And it is well settled that in such cases, general evidence of a combination to defraud or attempt to defraud others in the same way, may be shown to illustrate the *animus* and intention of the parties in the case in judgment: *Regina* v. *Frost*,

9 C. & P., 129; 2 Russ, on Cr., 699; 3 Greenl. Ev., §§ 90, 92. Every circumstance, however slight, that is calculated to throw light on the supposed crime, is to be considered: *State* v. *Swink*, 2 Dev. & Bat., 9. As a general proposition of law, it is undoubtedly true that no distinct and substantive crime can be shown upon the trial, but this rule is better understood as it is given in the text book, that the facts proven should be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge: 2 Russ on Cr., 772. And then it has been held that, if it be material to show the intent with which the act charged was done, evidence may be given even of a distinct offense, not laid in the indictment. And a case of robbery is cited, in illustration, where the prisoner went with a mob to the house of the prosecutor, and one of the mob, with a good intention, apparently, advised him to give them something to get rid of them and prevent mischief, upon which the prosecutor gave them the money laid in the indictment, it was held that for the purpose of showing that this was not *bona fide* advice, but in reality a mere mode of robbing the prosecutor, evidence was admissible of the demands of money made by the same mob at other houses, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present: 4 C. & P., 444. And upon an indictment for robbing the prosecutor of his coat, the robbery having been committed by the prisoner threatening to charge the prosecutor with crime,

Holroyd, J., received evidence of a second ineffectual attempt to obtain money the following day, by similar threats; and upon a case reserved the Judges were of opinion that the evidence was admissible to show that the prisoner was guilty of the former transaction: *Russ & Ry.*, 375. The case of *Britt* v. *The State* was an indictment for obtaining money by false pretences. The prisoner pretended that he had a warrant against the prosecutor for passing counterfeit money, and, by means of threats and promises in regard thereto, extorted bank notes from the prosecutor, in the county of Roane. On the next day the prisoner again pursued the prosecutor into an adjoining county, and falsely pretended that the prosecutor had stolen his coat, and by means thereof extorted from the prosecutor certain articles of clothing. The indictment charged the prisoner with obtaining the bank notes by falsely pretending that the prosecutor had passed counterfeit money. It was held that the transaction in the adjoining county, though a distinct offense and on a different day, was admissible: 9 Hum., 31. It may be safely assumed that whatever tends to explain or elucidate the charge in question, or to demonstrate the guilty connection of the parties therein, may be given in evidence though it may be a ground of another and distinct accusation. The intention to commit the crime is the essence of the offense, and that which illustrates the intention is always proper to be proven. We do not think that the Court erred in admitting the testimony, but, on the contrary, we hold that in such a case as this, involving as it does the previous connection of the parties and the

necessity of showing a fraudulent combination between them, it was eminently right and proper.

NOTE.—The case was reversed on another question. [REPORTER.

THE STATE *v.* JOHN QUARTEMUS.

VENUE. *Constitution.* Code 5125, dispensing with the allegation of venue is not in violation of the Constitution: Art. 1, sec. 9.

FROM KNOX.

In the County (misdemeanor) Court. C. W. JONES, J., presiding.

Attorney General HEISKELL, for the State.

J. R. COCKE, for the defendant.

DEADERICK, J., delivered the opinion of the Court.

The indictment in this case was quashed by the County Court of Knox county, upon motion of defendant, and the Attorney General appealed in error to this court. The objection to the indictment, which is for profanity, is, that it does not allege that the profane words were spoken in Knox county. While the better practice is, in all cases, to state the venue in the body of the indictment, by section 5125, of

the Code, it is provided that "It is not necessary for the indictment to allege where the offense was committed, but the proof shall show a state of facts bringing the offense within the jurisdiction of the county in which the indictment was preferred."[1]

This section of the Code is not in conflict with the 9th section of Article 1 of the Constitution, which declares that the accused has a right to demand the nature and cause of the accusation against him and to have a copy thereof. These are fully set out in the indictment, and the law requires that the proof should show that the offense was committed in the county in which the indictment was preferred.

It was therefore error to quash the indictment for the omission in the indictment to charge in what county the offense was committed.

The judgment of the County Court will be reversed; and the cause remanded to the Criminal Court of Knox county for further proceedings.

[1]See *Williams* v. *State*, *ante*, p. 35; *State* v. *Donaldson*, *ante*, p. 51.

The State *v.* Phineas Thurston.

THE STATE *v.* PHINEAS THURSTON.

PLEADING. *Former Conviction.* A plea of former conviction, which avers that the former judgment was reversed and the indictment thereupon dismissed, is bad.[1]

Cases cited: *Walton* v. *State*, 3 Sneed, 687; *Thurston* v. *State*, 3 Cold., 117.

FROM MONROE.

From the Circuit Court of Monroe county, E. T. HALL, J., presiding.

Attorney General HEISKELL, for the State, cited *Slaughter* v. *State*, 10 Hum., 410; 1 Wat. Archb., 373; *Com.* v. *Loud*, 3 Metc., 328; *People* v. *Casborus*, 13 John, 351.; *People* v. *Ruloff*, 5 Par. Cr., 77.

A void judgment is no plea: 10 Hum., 431. A judgment avoided on error is void. Even if a valid judgment were here reversed erroneously, it would be vacated and void, and could not be set up or cured by averment.

W. J. HICKS, for defendant, insisted that the plea was good as a plea of former acquittal. He insisted upon it, also, as a plea that the party had been once in jeopardy, and cited the *State* v. *Conner*, 5 Cold., 311.

[1] See *Logston* v. *State*, Nashville, Feb. 8, 1871, where a plea of former conviction was put in, and was disposed of in these words:—"There was a plea of former conviction for the same offense, which we need not notice, as it can not be seriously insisted that there are any merits in said plea; the judgment rendered on the trial at which such conviction was had, having been reversed and set aside by this Court, for want of jurisdiction in the court rendering it." Per FREEMAN, J.

The State *v.* Phineas Thurston.

NELSON, J., delivered the opinion of the Court.

The demurrer to the plea of former conviction, was properly taken and should not have been overruled. The indictment on which the defendant was formerly tried, was held by this Court to be fatally defective, for the reasons stated in the opinion in *Thurston* v. *The State,* 3 Cold., 117. In that case, the record failed to show when, where, how, or by whom the court was holden in which the indictment was found, and was in other respects defective, as was shown in the opinion. The plea in this case, shows that, after the judgment was reversed and the cause remanded, the indictment, together with all the proceedings against the defendant, was dismissed, and so the former conviction resulted in nothing. A trial upon the present indictment will not, therefore, put the defendant twice in jeopardy, within the meaning of the Constitution of 1834, Art. 1, Sec. 10, or of the same article and section in the Constitution of 1870.

This question has been before the Court in various forms, and was carefully considered in *Walton* v. *The State,* 3 Sneed, 687, and other cases. Walton's case, which refers to Bishop's then new work, is cited by him in the third edition of his Criminal Law, vol. 1, § 862. The provision in the Code, 5211, has no application to this case, as no statute has been passed to make the former indictment good.

Let the judgment be reversed and the cause remanded.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE,.....DECEMBER TERM, 1871.

THE STATE *v.* MCELROY.

ROADS. *Overseer. Indictment.* An indictment against an overseer for failing to keep a road in repair, which describes him, not as overseer of a particular road, but as "overseer of roads," is bad.

Cases cited: *State* v. *Vance*, 1 Tenn., 480; *State* v. *Kilgore*, 6 Hum., 45; *State* v. *Fields*, M. & Y., 141; *Budd* v. *State*, 3 Hum., 489; *State* v. *Heflin*, 8 Hum., 85.

Code cited: 5114, 5152, 1182, 1183, sub-sec. 9, 1198, 1200, 1216.

FROM LINCOLN.

Appeal from a judgment of the Circuit Court of Lincoln county. N. A. PATTERSON, J., presiding.

Attorney General HEISKELL, for the State.

A. S. COLYAR, A. S. MARKS and JAS. NEWMAN for defendant.

The State *v.* McElroy.

NELSON, J., delivered the opinion of the Court.

The presentment describes a road leading from Fayetteville to Elkton, which forks at the widow Timmon's plantation, from whence there is a road leading to Pulaski; and charges that the defendant, having been duly "appointed by the County Court of Lincoln county aforesaid as overseer of roads," was bound, within thirty days after his appointment, "to cause to be set up and kept in repair, at the forks aforesaid, a post or posts, with arms pointing the way of each of said roads, directing to the most public places, with the number of miles from that place," &c., and "yet he has not done it, to the great damage and common nuisance of all the good citizens of said State," &c.

On motion of the defendant, the Circuit Court at Fayetteville, in which it had been made, quashed the presentment, and the State through the District Attorney, appealed.

Notwithstanding the innovations made by the Code, sections 5114, 5152, on many of the ancient and well established forms of criminal pleading, and the case of *State* v. *Vance*, 1 Tenn. R., 480, 482, (top page,) to which the editor has appended a note, this presentment can not be sustained for the reason that it describes an offense unknown to the laws of this State. The Code, section 1182, defines what are public roads, and in section 1183, sub-section 9, authorizes the County Courts "to appoint annually overseers of roads," but makes no provision for the appointment of such a State or county officer as "overseer of roads." Section 1198 provides

that "the County Court shall annually appoint an overseer, by an order which shall designate the bounds in which the persons subject to work on his road reside, and the class of the road which the overseer is required to keep in repair." Section 1200 provides that no person is bound to serve as overseer of a road who does not live within the bounds including the hands assigned to work on said roads. And in section 1216, it is provided that every overseer shall, within thirty days after his appointment, carefully measure and mile-mark his road," * * "and also cause to be set up and kept in repair at the forks of all the public roads in his district, a post or posts, with arms pointing the way of each of said roads," &c. An overseer, therefore, is appointed for a particular boundary or district, and as there are many overseers in the different counties, he is not properly characterized as an overseer of roads generally, but should be described as the overseer for the particular road to which he has been appointed; and the bounds of the road, as described in the order of the County Court, or as actually superintended by him, should be stated in the presentment. In the case of *State* v. *Kilgore*, 6 Hum, 45, it is said that the object of an indictment or declaration is to notify the defendant of the substantial charge or claim against him; and this object is not attained unless the allegations point out *the specific nature of the charge* or claim, in terms of reasonable certainty." In, also, *State v. Fields*, Mart. & Yer., 151; *Budd* v. *The State*, 3 Hum., 489; *State* v. *Heflin*, 8 Hum., 85.

Affirm the judgment.

FREDERICK GIBBS *v.* STATE.

1. STATE REVENUE. *Felony in failing to pay.* In an indictment under the Act of 1860, c. 131, s. 3, for felony in failing to pay revenue into the Treasury, the venue is properly laid in the county in which the accused was Collector.
2. SAME. *Offense of omission.* This offense is one of the will, to be ascertained from passive conduct in failing to take or send the money to the Treasury.
3. JURY. *Constitutional Law.* The Act of 1866, c. 5, s. 1, declaring that persons not qualified voters were subject to challenge as jurors, was unconstitutional and void.

FROM SMITH.

Appeal from the Circuit Court, A. MCCLAIN, J., presiding.

JAMES MCHENRY, W. H. DEWITT, and W. W. WARD, for the plaintiff in error, on the question of venue, cited Constitution, Art. 1, s. 9; *Armstrong* v. *State*, 1 Cold., 338; *Kirk* v. *State*, Ib., 344; and insisted that the crime being one of omission, the failure to pay occurred where the payment ought to have been made: at the Treasury; and as to its locality, he cited Code, 228, 229. They cited also, 1 Bish. Cr. Pro., § 79. That the money was due by law at the end of the year, Dec. 31, 1867: Code, 647; and that there was no proof that defendant resided in Smith county on or after the 1st of January, 1868.

That fifteen jurors summoned were challenged for cause, under the act of 10th September, 1868. They argued that the act in question, though now repealed,

demanded a mark of judicial condemnation, as an encroachment upon the liberties of the people. They cited Constitution of 1834, Art. 1, ss. 6, 9; also, s. 6, of the Constitution of 1870, as amended, in view of these laws. Cooley's Const. Lim., 60; 1 Bish. Cr. Pro., §§ 764, 768, 781, n. 2; 3 Bl., 358, 361, 365.

They insisted that the laws were the offspring of passion; that they rendered incompetent one hundred thousand persons otherwise good jurors; that certain provisions of the Franchise Acts had been held void in Staten's case, 6 Cold., 233; that if this test was admissible, any other would be within the power of the Legislature; the relation of any other test being as appropriate as this, to determine the qualities requisite to discharge the duties. They cited in conclusion: 2 Story on the Const., §§ 1779, 1780; 4 Bl. Com., 349, 350; 2 Kent, 1, 9.

In a supplemental brief they insisted that the law was *ex post facto* and void by Const. U. S., Art. 1, ss. 9, 10; *Fletcher* v. *Peck*, 6 Cranch., 188; *Calder* v. *Bull*, 3 Dal., 386; 1 Kent, 409; Const. of 1834, Art. 1, s. 11; *Cummings* v. *Missouri*, 4 Wal., 326, 377.

Attorney General HEISKELL admitted that under the holding of the Court in *Gunter* v. *Patton*, 2 Heis., 257, the excluded jurors were competent; but the record showed that the defendant had not exhausted his challenges, citing *Carroll* v. *State*, 3 Hum., 315, 317; *Henry* v. *State*, 4 Hum., 270, 271; *McGowan* v. *State*, 9 Yer., 193; *State* v. *Will*, 7 Rich., (S. C.) 412, cited in Archb. Cr. Pr. and Pl., 649. That his right was not to have specific jurors, but it was rather a right not to be tried

by those not acceptable to him. Of this the test was the putting a juror on him when he had no power to challenge.

That the venue was properly laid in the county in which he was tax collector; that it was proper for the Court below to admit evidence of a motion and judgment against defendant for this money, in order to show a failure to pay, and of the defendant being present when the motion was tried, in order to prove a demand and failure in that county; that the Act requiring the Attorney General of the district to proceed in the district where the defendant resided, was conclusive that the venue in all such cases was not to be at the Capitol. To try all persons so accused at the Capitol, would give the State an undue advantage, and violate the spirit of the Constitution; that the failure to pay was committed wherever the defendant was, from the time the duty is fixed until it is performed. Cited 1 Wat. Archb., 242.

TURNEY, J., delivered the opinion of the Court.

The judgment of the Circuit Court is erroneous. The plaintiff in error was Tax Collector for Smith County, for the years 1866 and 1867. At the November Term, 1868, of the Circuit Court for that county, he was indicted for failing and refusing to pay into the Treasury of the State the taxes collected by him. The indictment is based upon Section 3, chapter 131, of the Act of Assembly passed March 10th, 1860, which is in these words:

"*Be it further enacted*, That if any Tax Collector shall hereafter wilfully fail and refuse to pay into the Treasury of the State the revenue which he has collected, he shall

be guilty of a felony; and it shall be the duty of the Attorney General of the district in which such defaulting revenue collector may reside, to prosecute him for such offense, and upon conviction thereof, he shall be imprisoned in the State Penitentiary for a period of not less than five nor more than twenty years."

At the March Term, 1860, plaintiff in error was tried, convicted and sentenced to the Penitentiary for a term of five years; from which finding and sentence he appealed to this Court.

It is objected, first, that the indictment was not preferred and found in the proper county; that the offense, if any, was one of omission, committed in Davidson county, where the Treasurer is required by law to keep his office and transact the business thereof; and that the Circuit Court of Smith had no jurisdiction. We do not concur in this view. 1st, Because the act making the default a felony makes it the duty of the Attorney General of the district in which the defaulting collector resides, to prosecute him for the offense, and it could not have been the intention of the Legislature to give exclusive jurisdiction in such cases to the courts of one county, and require the various District Attorneys General of the State to go to that county to prosecute, disregarding the interests of the State in other criminal prosecutions in the entire balance of the State.

2nd. The offense is one of the will, its commission to be ascertained from the passive action of the accused, in not going with or sending the revenue by him collected in a reasonable time to the Capitol to be paid into the Treasury.

It is further objected by plaintiff in error, that the Circuit Judge erred in overruling his objection to challenges made by the Attorney General to the competency of fifteen jurors, otherwise competent, than that they "had not certificates to vote under the Franchise Acts of the Legislature of this State."

This exception to the ruling of the Court was well taken. The action of the Court was founded upon Section 1, ch. 5, of the Act of 26th November, 1866, as follows: "*Be it enacted by the General Assembly of the State of Tennessee,* That in all trials of civil or criminal cases in any of the courts of this State, it shall be good ground of challenge for cause as to competency of any juror, that such juror is not a qualified voter of this State."

This legislation was had with reference to that of June, 1865, and May 3rd, 1866, and is a precedent qualification of that of 25th February, 1867, inappropriately denominated the "Franchise Laws."

The Act of November, 1866, entitled "An Act to define the qualification of Jurors, is unconstitutional and void.

"That the right of trial by jury shall remain inviolate," is a positive and inalienable, as well as constitutional, guaranty to every citizen of the State.

The Constitution secures to the accused, in prosecutions by indictment or presentment, a speedy *public* trial, by an impartial jury of the county or district in which the crime shall have been committed.

Under this statute do these fundamental principles obtain. No dispassionate and just mind can for a

moment think so. Reading it in the light of the Acts to which it has reference, and of which it is in fact a part, it is plain it was the offspring of wild political passions, intended to build up one political party and tear down another, and to destroy that equilibrium which paralyzes fanaticism and begets conservative justice.

It can not be "*an impartial jury*" selected and qualified alone because of its political opinions, produced in times of high excitement resulting from a bloody civil war, in which the State was distinctively divided against itself. The political adversary of such a jury stands a poor chance for a just administration of law. If a Legislature may restrict the qualification to a political test, it may to a religious one, and declare that none save members of a particular denomination shall be competent; it may restrict it to the farmer, the mechanic, the merchant, or to any other one class of the callings in life, and further refine and classify that class.

By the statute under review, the constitutional provision, "That the right of trial by jury shall remain inviolate," is abrogated, and the guaranty of trial by an impartial jury, is expunged from the "Declaration of Rights."

Reverse the judgment and remand the cause for a new trial.

THE STATE *v.* CAMERON.

1. FORMER ACQUITTAL. *Identity of offenses.* An acquittal on an indictment for embezzlement of Revenue, by "falsely pretending that said Revenue was taken from him (the defendant) by robbery," is a bar to a subsequent indictment for failing to pay over the same moneys.
2. EMBEZZLEMENT. A mere failure to pay is evidence of embezzlement.

Case approved: *State* v. *Leonard*, 6 Cold., 307.

Cases cited: *State* v. *Leonard*, 6 Cold., 307; *Hite* v. *State*, 9 Yer., 374, 375; *Campbell* v. *State*, 9 Yer., 337; *Major* v. *State*, 4 Sneed, 608; *Esmon* v. *State*, 1 Swan, 14; *Slaughter* v. *State*, 6 Hum., 414; *State* v. *Norvell*, 2 Yer., 27.

FROM WHITE.

In the Circuit Court. W. W. GOODPASTURE, J., presiding.

Attorney General HEISKELL, for the State, insisted that as the Code 4706 requires some act of commission "use by loan, investment or otherwise, or a conversion, to constitute the offense of embezzlement, and the Acts of 1860, c. 131, and 1868, c. 79, s. 14, only require an omission to pay—the acquittal under the former act, did not disprove the omission. Embezzlement includes failure to pay, but failure to pay does not constitute embezzlement. Acquittal of a greater offense does not preclude a trial for the less, unless it be of that character which would admit of a verdict for the inferior on an indictment for the higher offense. Acquittal for murder does not bar an indictment for as-

sault to kill. See 1 Whar. Am. Cr. L., § 560 to 565; Russ on Cr., 829, 830 to 835; *R.* v. *Henderson*, 2 Moody, 192.

S. H. Colms, (with whom was Nesmith) for defendant, insisted that the failure to pay over under this indictment, must be "willful." That if the officer was robbed or had the money accidentally burned or destroyed, it would show that he did not refuse to pay *willfully*. So that the proof is the same in both cases.

The true test is, whether the evidence necessary to support the second indictment would have been sufficient to support a conviction on the first: *Hite* v. *State*, 9 Yer., 357, Ch. Cr. L., 453; Archb. Cr. Pl., 88; Roscoe, Cr. Ev., 77. Under the first indictment there must be proof that the defendant "used, loaned, invested or converted the revenue," (and the indictment charges that he pretended he was robbed,) in order to convict.

Under the present, there must be proof of *willful* failure. The proof then must be the same under both, and proof of loss of the money by robbery or destruction, would be a good defense to either. He cited *The State* v. *Leonard*, 6 Cold., 307, 310.

Mr. Attorney General, in reply: The argument for the defense is fallacious. An acquittal for murder can not bar a charge of assault. The proof to support the one will not support the other. It may be the same act, but if the party did not die within the year and a day, it could not be murder, and the acquittal could be no test of guilt of assault. It might as well be said that an acquittal for perjury would bar

a charge of assault. The Court, in either case, can see that the issue is not the same, and no averment that it is the same can make it so. Of course a demurrer would meet it. If so, it is equally so in any case where the issue is not the same, as, murder and assault.

It may be that in murder the defendant proves that he was justified in the assault he made, yet if the party did not die, though the *very facts* were before the jury, they could not, nor could the fact that the jury passed on them, bar a charge of assault. As the offenses are different, the one can not bar the other. That the very fact relied on in defense may have been before the jury and passed upon, and that they may have acquitted solely upon the ground of justification of the murder, can not affect the question. That the party could not possibly have been convicted of the assault on the indictment for murder, is conclusive that the acquittal is no bar. In the case at bar, the pretended robbery may have been negatived; the pretence may have been negatived; or there may have been a failure to prove the allegation. Yet, there might have been proof that the defendants kept the money marked as the money of the State, for months before. There would be willful failure, but not embezzlement. The same facts may come in issue here as there, but to prove a different issue. In that case, a pretence of being robbed was the overt act of embezzlement on which the State relied. A failure to prove that pretence would be a failure of the indictment. Actual robbery would disprove the *pretense.* In this case, no

proof of pretense of robbery is necessary, no disproof of it pertinent. If the defendant prove it here, he brings it to meet a different allegation and issue. Here to disprove the *willful* failure by showing an unwilling failure; there to disprove the very act of appropriation charged. Just as in the case of murder, the assault, if justified on the indictment for murder would not prevent a trial for the assault.

On a bad indictment, or an indictment misdescribing the offense in the name of the party whose property or person is affected, or in the character of the property, an acquittal is no bar, and the averment of identity in a plea can not supply the want. It must be legally identical, and legal identity can not exist between stealing a white horse and a bay, the horse of A and the mare of B. Nor can it exist as to two offenses requiring different degrees of proof. If the first had charged embezzlement by speculation or loaning the funds, would that be a bar to this? The State might fail in that, but it would not show that he was not guilty of this.

NELSON, J., delivered the opinion of the Court.

The indictment charges that the defendant "on the 8th day of January, A. D., 1870, in said county and State—(he, the said James H. Cameron, being a Tax Collector for the collection of State and County taxes, or revenue, due to the State aforesaid, from the county aforesaid, for the years A. D., 1868 and 1869, and having collected, as such tax collector aforesaid, a large

amount of taxes aforesaid, viz: the sum of $3,000, due the State aforesaid)—did, then and there, willfully fail and refuse to pay into the treasury of the State, the revenue which he had collected as aforesaid, viz: the sum of $3,000, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State." To this indictment the defendant pleaded a former acquittal upon an indictment charging "that James H. Cameron, revenue collector for the county of White, having been duly elected, given bond and taken the oath, and having, in all respects, fully qualified, according to law, to collect the State and county revenue due to the State and county aforesaid, from said county for the years 1868 and 1869, and having proceeded to and did collect a large amount of the revenue aforesaid, to-wit: the sum of four thousand dollars due to said State, did, on the 8th day of January, 1870, in said county and State, he being then and there charged with the collection and safe keeping of said money aforesaid, feloniously, fraudulently, corruptly and unlawfully embezzle, appropriate, conceal and convert to his own use, the sums of revenue aforesaid, by corruptly and falsely pretending that said revenue was taken from him by robbery, when, in truth and in fact, it was not; and against the peace and dignity of the State. The grand jury aforesaid, upon their oath aforesaid, do further present, that the said J. H. Cameron, tax or revenue collector, as aforesaid, for said county and State, and having collected a large amount of the taxes, in said county and State, due to the county aforesaid, and being charged with the collection and safe

keeping of the revenue collected as aforesaid, viz: the sum of four thousand dollars, due as aforesaid to said county, did, on the 9th day of January, 1870, in said county, conceal, appropriate and convert to his own use, said taxes aforesaid, due as aforesaid, with the felonious intent to unlawfully deprive the said county thereof, and against the peace and dignity of the State."

To this plea the Attorney General filed a demurrer, assigning as causes: 1st. That the plea does not allege that the indictment is for the same offense for which he had been previously discharged. 2d. Because there is no record of a former trial pleaded. 3d. Because there is a variance in the plea and the record.

The Circuit Court of White county, in which both causes were tried, overruled the demurrer to the plea, and adjudged that the plea be sustained, and that the defendant go hence without day, and recover of the State his costs, &c.; and from this judgment the State appealed.

The question principally discussed here, relates to the identity of the offenses charged in the indictments; or, more accurately stating the question, it is alleged in behalf of the defendant, that the offense of embezzlement of which he was acquitted, embraces the offense of failing to pay over the revenue charged in the second indictment.

In the Code, Sec. 4706, it is declared that, "if any person within the State, charged with the collection, safe keeping, transfer or disbursement of money, or property, belonging to the State, or any county, use any part of said money or property, by loan, investment, or other-

wise, without authority of law, or convert any part thereof to his own use in any way whatever, he is guilty of embezzlement; and for every such act, upon conviction, shall be imprisoned in the Penitentiary not less than five nor exceeding twenty years, and fined in a sum equal to the money embezzled, to be applied in satisfaction thereof."

By the act of 1860, chap. 131, sec. 3, it is provided that, "if any tax collector shall hereafter willfully fail and refuse to pay into the treasury of the State, the revenue which he has collected, he shall be guilty of a felony," &c. This statute was re-enacted by the act of 13th March, 1868, ch. 79, sec. 14, which declares further, that "the word tax collector, as used in this section, is intended to include and embrace all persons entrusted with the collection of the public revenue."

The section above quoted from the Code, was construed in the case of the *State* v. *Leonard*, 6 Cold., 307. That was an indictment against a county trustee; and it is there said that, "failing and refusing to pay over the money to his successor in office, is, unexplained, evidence of a conversion of the money to his own use; and, if proved, will establish the allegation of the indictment, that he did embezzle and convert the money to his own use:" *Ib.*, 309. It follows, therefore, that the offense of failing or refusing to pay the revenue collected, into the treasury of the State, is included in the offense of embezzlement; and although it requires more evidence to convict of the latter than the former offense, when the money collected has been loaned or invested contrary to law; yet the conversion of the fund,

by the collector, to his own use, is, when not paid over to the treasury, under either statute, a felony; and, although evidence of the collection and failure to pay into the State treasury, would support an indictment under the statutes of 1860 and 1868, and might not be sufficient to embrace a case of loaning and investing without authority of law, the offense is, in law, precisely the same under either statute, when there is a conversion and the money not paid over. And it was charged in the former indictment, against the defendant in this case for embezzlement, that he falsely pretended the revenue was taken from him by robbery, when it was not. The finding of not guilty in that case, was equivalent, perhaps, to a verdict that the defendant had been robbed; and if robbed, that would be a lawful excuse for the failure to pay into the State treasury, and would disrobe the act of any felonious intent. Be this as it may, the defendant was acquitted upon the charge of converting the fund to his own use. The failure to pay into the treasury, as has been seen, was evidence of such conversion; and the acquittal upon the charge of conversion is a bar to the prosecution for failing to pay into the treasury.

Questions similar to this have been before this Court, in different forms, in cases heretofore determined: See *Hite* v. *The State*, 9 Hum., 374, 375; *Campbell* v. *The State*, 9 Yer., 337; *Major* v. *The State*, 4 Sneed, 608; *Esmon* v. *The State*, 1 Swan, 14; *Slaughter* v. *The State*, 6 Hum., 414; *The State* v. *Norvell*, 2 Yer., 27. It would be useless to review the cases, or to show in what particulars they agree with, or differ from this in principle.

There can be no doubt that a former acquittal or conviction, must be for the same identical offense, but it is not necessary that all the particulars charged in either indictment should be the same: See the cases cited in 1 Waterman's Arch. Cr. Pl., 371–374. See, also, 1 Whar. Am. Cr. L., 6th ed., § 560.

It may well be doubted, whether, even under the curative provisions of the Code, the indictment in this case is not defective, in not charging that the act was "feloniously" done; but as no other question has been argued before us but the one which has been determined, we forbear to consider technical objections, which might be made as well to the two indictments as to the plea.

Let the judgment be affirmed.

Lot S. Anderson *v.* The State.

1. Record. *Several indictments in same transcript.* Where three indictments for murder appeared in the transcript, and it did not appe in any manner, on which of them the defendant was tried, the conviction was held bad.[1]
2. New Trial. *In Supreme Court, on facts.* In a conviction for voluntary manslaughter, where the facts set out in the bill of exceptions left it doubtful whether the act from which the death resulted was accidental or designed, the conviction was held bad.

[1] See *Vincent* v. *State*, *post*, 120.

Lot S. Anderson *v.* The State.

3. INDICTMENTS. *Should state the actual offense.* The practice of sending bills in all cases of homicide, for murder in the first degree, reprehended by the Court.

4. CHARGE TO JURY. *Should apply the law to the facts.* It is the duty of the Circuit Judge to apply the law to the facts of the case, so as to facilitate the investigation of the case by the jury.

5. SAME. *Error, to misapply presumption.* In a case where it is doubtful on the proof whether the act of the defendant from which the death happened was not accidental, it is held error in the Court to charge, that if a party use a deadly weapon and kill, he is presumed to have intended to take life.

FROM WHITE.

Appeal from the judgment of the Circuit Court of White county. S. M. FITE, J., presiding.

The Circuit Judge, after a general statement of the law of homicide, in the course of which occurs that part of the charge first made the subject of comment in the opinion, proceeded as follows:

"If the deceased, Sparkman, had been unlawfully assaulted by McBride with a pistol, and Sparkman, to defend himself, had seized McBride to prevent himself from being shot, and whilst thus holding him, had knocked the pistol out of his hand, and the defendant then, at the call of McBride, willfully, deliberately, and premeditatedly and maliciously, shot and killed Sparkman, that would be murder in the first degree. But if such act were done under heat and excitement, but was unlawful and malicious, it would be murder in the second degree; and as before stated, if the killing was willfully done with a deadly weapon, the law infers or implies the malice.

"Again, if McBride had assaulted Sparkman, the deceased, with a pistol, and Sparkman had taken hold of him for the *bona fide* purpose of preventing him from shooting him, and knocked the pistol out of his hand, and the defendant, Anderson, picked it up and presented it at Sparkman within a distance it would carry ordinarily, for the purpose of intimidating Sparkman, and preventing him from defending himself against McBride, and though not intending to fire the pistol, it went off accidentally whilst thus pointed and killed Sparkman, that would be involuntary manslaughter; because, pointing the pistol at Sparkman under such circumstances, would be an assault on him, and consequently an unlawful act; and if the pistol went off accidentally whilst committing the unlawful act of assaulting Sparkman, it would be involuntary manslaughter.

"Again, if McBride and Sparkman were engaged in a mutual combat, and no danger of either taking the life of the other, but merely an ordinary assault and battery, or affray, was being perpetrated, it would have been lawful for any by-stander to interfere for the *bona fide* purpose of separating the combatants, and to use such force as was necessary to separate them; but if, in such case, the interferer unnecessarily and improperly used a deadly weapon, it would be doing a lawful act, that is, separating the combatants, in an unlawful manner; and hence, if Sparkman was killed by the use of the pistol upon him by the defendant, interfering in that way, it would be manslaughter, even though not malicious. But if Sparkman was about to commit a felony on McBride, as to take his life or do him some great

bodily harm, then, if the use of the pistol was necessary to enable him to prevent Sparkman from committing the felony, he might do so, and would be guilty of no crime, though he shot and killed him. A person may even take life to prevent another from committing a great crime, but can not justify the taking of life to prevent the commission of a simple assault and battery, not endangering life or limb.

"Again, if the defendant merely picked up the pistol without any intention to use it on Sparkman, and did not present it at him for the purpose of intimidating him, or otherwise assaulting him with it, and while holding it in his hand, it accidentally went off and killed Sparkman, that would be a killing by misadventure, and not criminal, and you should acquit him. But, if the motive of the defendant was improperly to intimidate Sparkman, and he presented the pistol at him for that purpose, though not intending to fire it off, and it went off accidentally whilst thus presented, and killed Sparkman, it would be a case of involuntary manslaughter.

"Again, if Sparkman and McBride were engaged in a mutual combat, and the defendant having no connection with the difficulty, seized the pistol and willfully shot Sparkman and killed him, the use of a deadly weapon would imply malice, and it would be murder in the second degree. And if the act was coolly, deliberately and premeditatedly done, it would be murder in the first degree.

"In conclusion, on the question whether the shot was fired by accident or design, it is proper that you

should look to the evidence in relation to a motive, or the want of evidence of a motive, on the part of the defendant, to do the act. If there is no evidence of a motive to do the killing, it is a circumstance of much weight in behalf of defendant's innocence, as to the willful killing of Sparkman, as men do not usually commit great crimes without some adequate motive. But if you believe that defendant presented the pistol at Sparkman merely to intimidate and not to shoot him, and thus aid McBride, and it accidentally went off while thus presented, a less amount of motive to do such an act, not intended to take life, would usually be looked for or expected. It is quite evident that a man might present a pistol merely to intimidate, not intending to shoot, though that would be an assault, with much less exciting cause, than would usually be the accompaniment of a willful design to take life."

"The Judge, in answer to an instruction asked for by the prisoner's counsel, further said: "In considering whether this was an accidental or willful killing, the absence of motive to do it may and should be taken into consideration as a strong circumstance for defendant, if no motive for the act is shown, as a person is not likely to commit a great crime without motive."

E. L. GARDENHIRE, for plaintiff in error.

Attorney General HEISKELL, for the State:

Insisted that only two indictments were ever found against the defendant; the record showing that the first one

was sent back to the grand jury, and found over to cure some defect. On this the defendant was arraigned and pleaded at the same term. At the next term another indictment was found, and the defendant was arraigned and pleaded not guilty, and was tried, the arraignment plea and trial being shown in the same entry. This was on the indictment which was last found, for he had already been arraigned upon the other, and had a plea of record, and he would not be arraigned and plead again upon the same indictment. But he pleads, and the trial proceeds in the same entry.

But suppose this case: A record has two indictments sent up here, with nothing to indicate on which the proceedings were had. To what does this amount? Simply to this; that the one on which he was tried, which was read to the jury, was corporeally present, and perfectly known at the time, with its concomitants, supœnas, etc., constituting one file, and the other with its papers constituting another file, have either been mixed by the Clerk, and that he has no marks by which he can tell to which the entries of record belong, or that he has mixed up two cases in the transcript which he could distinguish. If the two records were mingled, so that there remained no mode in which the Clerk could distinguish them, what would be the result? Not that there would be no judgment at all, or no valid judgment, but that if there was material in the files of both cases on which a judgment could be maintained, it would be good. In other words, as in case where there is a good count and a bad one in the same indictment, and the jury find on one without saying which, the verdict is referred to the

good and not the bad count, on the principle that the Court and jury are presumed to act rightly and not erroneously. So if there was such an uncertainty as that supposed, the Court below would be held to have acted upon the good indictment, especially where there was no motion in arrest pointing out any defects existing in one which did not exist in the other, or showing that the point was raised below.

If any doubt existed on the record as it stands, the Clerk could ascertain which indictment belongs to the file in which the Judge's charge and bill of exceptions is made out, and could still make out a good record. But the previous case, before the caption and proceedings in October last are mere surplusage, which ought to be disregarded by the Court.

NELSON, J., delivered the opinion of the Court.

Three indictments appear to have been found against the plaintiff in error and one Thomas McBride, for the murder, in the first degree, of James Sparkman; two at the September Term, 1869, and the other at October Term, 1870, of the Circuit Court of White county; and it does not appear, either from the bill of exception, or any other part of the record, upon which of the indictments the defendant was tried. His trial occurred at October Term, 1870, when he was found guilty of voluntary manslaughter, sentenced to five years' imprisonment in the Penitentiary, and appealed to this Court. At the September Term, 1869, the plaintiff in error was admitted to bail on the first indictment; and the case was declared not bailable as to his co-defendant, McBride,

who was committed to prison. At the same term, permission was granted the Attorney General to re-commit the indictment to the grand jury; but whether it was actually sent back to said jury, or again returned into court, does not appear with certainty, though it may be inferred tnat a new indictment was sent, as the first indictment does not purport to have been made under oath, and is signed "A. F. Capps, Att'y Gen. P. T.," while the second indictment purports to have been made on oath, and purports to be signed "A. F. Capps, Attorney General, *pro tem.*" The first shows the names of the prosecutor and witnesses, and shows also the finding of the grand jury. The second contains no indorsements whatever, and does not even show the finding of the grand jury that it was a true bill, and can not, properly, be regarded as an indictment. At the May Term, 1870, the defendants were arraigned and charged upon "the indictment," and pleaded not guilty. The plaintiff in error entered a motion, supported by affidavit, "for a severance of their trial," which, together with the cause, was continued, McBride being remanded to jail, and the plaintiff in error recognized. At the October Term, 1870, it appears that after the selection of the grand jury, two jurors were substituted in the place of two others, to act as grand jurors "in considering a bill of indictment preferred against Thomas McBride and Lot Anderson;" and a bill of indictment entitled of the October Term, 1870, with all proper indorsements thereon, was returned into court against Thomas McBride and the plaintiff in error for the same homicide, signed "Geo. H. Morgan, Attorney General 5th Circuit." No action

appears to have been taken on the motion to sever, nor does any new motion appear to have been made upon the new indictment. The record then contains the following entry:

"STATE OF TENNESSEE
v.
"LOT S. ANDERSON. } *Indictment for Murder.*

"Came the Attorney General, who prosecutes for the State, and the defendant in proper person; and the defendant being arraigned and charged on the indictment, says he is not guilty, and for his trial puts himself upon the country; and the Attorney General doth the like. Then came a jury of good and lawful men," &c., who were elected, tried and sworn, the truth to speak on the issue joined, &c., and were respited from rendering their verdict, from day to day, till Monday morning; upon which day the record states that they, "upon their oaths, do say the defendant is guilty of voluntary manslaughter; and that he be, therefore, imprisoned in the State Penitentiary for five years; whereupon came the defendant by his attorney, and moved the Court for a new trial, and also for arrest of judgment; which motion was continued for further action of the Court."

The transcript of record does not show, as it should, the different days and dates of the meetings and adjournments of the court during the progress of the trial; but the record shows that the motion was overruled, and that the defendant excepted and appealed; and it may be inferred that this action was had on a day of the term subsequent to the day of the motion. Nor does the record show that A. F. Capps, whose name is signed

as Attorney General *pro tem.*, was appointed as such under the Code, 3962, or under section 319.

It is impossible, from this transcript of the record, to determine whether the plaintiff in error was tried upon all or either of the indictments contained in it. The record does not contain any designation of the indictment by numbers, or any other evidence to enable us to discriminate between the indictments. It contains no indictment against the plaintiff in error alone, and does not show whether his motion for a severance was acted upon, or what disposition, if any, was made of the cause as to his co-defendant. Ordinarily, where there is an indictment against two, and one of the defendants is put upon his trial alone, it may be presumed that the other defendant was not arrested, or that a severance was permitted by order of the Court. This presumption may well apply where there is but one indictment or presentment contained in the record, but can not attach where there is so much uncertainty as in this case. Nor do we perceive how the defect could be remedied by any statement or certificate from the Clerk, as such statement would be no part of the record itself. It may be that there are two separate files of papers in the court, and that two or more indictments are copied upon the minutes; but how could such a state of facts determine on which indictment the plaintiff in error was actually tried? It is a familiar principle that if, in a criminal case, the evidence shows, conclusively, that one of two persons committed an offense, but leaves it uncertain which of them is actually guilty, neither can be convicted. And how can it be said, in view of the constitutional pro-

vision, that "no free man shall be put to answer any criminal charge, but by presentment, indictment or impeachment," that the plaintiff in error has been tried upon an indictment, when the record shows that there are more indictments against him than one, but does not show upon which of them he was arraigned and tried? We do not hold that it would be impossible for the plaintiff in error, if the judgment against him were affirmed, to plead his conviction in this case in bar of another indictment; for the plea is of a mixed nature, partly of matter of record, and partly of matter of fact; the first relating to the indictment, and the second being the averment of the identity of the offense, and of the person as having been formerly indicted. See 1 Wat. Arch. Cr. Pl., 369, 370. Nor do we declare that it could not, in a proper case, be shown by parol evidence, in the Circuit Court, upon which of two or more indictments for the same offense, the party was actually tried; but such evidence can not be heard or supplied in this appellate tribunal, and in a case situated like this. The liberty of the citizen is of such inestimable value that he can not be deprived of it by judicial proceedings, except according to the strictest forms of law. These forms were established, in the struggle of centuries, to protect the citizen against the prerogatives of the king; and being well known and understood, alike in England and in our own country, as effective checks upon arbitrary power, it is to be regretted that they have not been more sacredly cherished.

As appearing, however, in the transcript, the question is one of substance, and not of form, and extends to the

foundation of the conviction itself. There are objections to two of the indictments, which do not exist as to the third; but it is not necessary to specify them.

We would willingly forego the labor of further investigation and remand the cause alone upon the error indicated, but feel that our whole duty will not be discharged without the consideration of other propositions urged in argument.

So far as the facts are disclosed in the record, but two witnesses were examined who were actually present at the homicide. One of them, John E. Witt, was assailed upon the trial and shown, by various witnesses, to be unworthy of credit on oath, in consequence of his general bad character. Other witnesses, who were related to him, or otherwise prejudiced in the cause, sustained his credit, and, upon this state of proof, such a doubt is thrown upon his testimony, that, while we do not hold he is utterly unworthy of credit, we do not feel called to analyze his statements, although we will advert to some of them, or to state how far he is corroborated, and leave the question of his credibility to be determined by the jury, under proper instructions from the Circuit Court. For the purposes of this opinion, the facts of the case may be stated upon the evidence of Levi W. Wood, the other witness, whose credibility is fully sustained. His statement is as follows: "Thomas McBride and James Sparkman were playing cards for a pistol. McBride said he was seven, Sparkman said they were six and six. Then Sparkman got up and started off, and said McBride would not play a fair game; McBride said he would play a fair game; Sparkman

started to his house; McBride took up his pistol and cocked it and pointed it towards him and told him to come back; Sparkman said he would not; McBride said he would make him. Mr. Sparkman came back and took McBride by the bosom of his shirt and by the arm. Mr. McBride called for Lot and said, come here, Lot. The pistol went towards Lot, who picked it up and stood a little while, with the pistol in both hands, and then shot him. The parties had some liquor that day; Sparkman was not drunk; Lot S. Anderson had been drinking, but was not drunk."

Other witnesses prove that although the plaintiff in error is neither an idiot nor a lunatic, he is a youth, sixteen or seventeen years of age, and of dull and feeble intellect. It is also shown, that he was intoxicated at the time of the homicide.

The statements of Wood and Witt, the impeached witnesses, are similar as to the leading facts, but both are singularly defective in not detailing the particular circumstances which attended the direct act of shooting; how far the parties were from each other; whether they were standing or sitting; or were directly face to face; the particular manner in which the pistol was held; whether it was aimed or pointed at the deceased; whether the plaintiff in error held both hands near his person, or extended them so as to indicate a deliberate, or momentary, purpose to fire; and other particulars which might elucidate the transaction and show whether the homicide was accidental or intentional, are not stated. Witness says, after McBride presented the pistol and ordered Sparkman to come back, "Sparkman then came right back

and caught McBride by the breast of the coat and knocked, or jerked the pistol out of his hand, and threw or knocked it on the ground; McBride caught him by the collar of the coat; Sparkman pushed McBride back on a still tub, when McBride said, I have nothing against you; Sparkman said, I have nothing against you; McBride said, come here Lot and get my pistol and help me. Lot picked up the pistol and shot Sparkman in the right shoulder. Then Sparkman walked around one or two still tubs to where I was and said, John, I am shot, &c. The witness says, that at first, he paid no attention to Sparkman, "for I thought he was not hurt much, on account of the way he was standing and the way he was shot," but does not describe how he was standing or "the way he was shot." He says further, that "when the pistol fell out of McBride's hand, it fell towards where Lot Anderson was." Both witnesses state that the pistol was cocked when McBride presented it at Sparkman and ordered him back, and there is no proof that its condition was changed when it was picked up by the plaintiff in error. It does not appear that there was any previous unkind feeling between the plaintiff in error and the deceased, or one word of altercation before the fatal result. If the plaintiff in error shot the deceased by design and at the command of McBride, the verdict of the jury was merciful. If he shot without intention, without aim, without the concurrence of his own will, and by accident, either in picking up the pistol, or in attempting to let down the hammer, he was guilty of no offense. If he really committed a crime, no motive is shown for its commission,

unless the statement of Witt is to be credited, and it shall be inferred from that statement that his object was to aid his friend. Yet it is difficult to determine what the true motive was, if indeed there were any motive, where it seems that McBride and Sparkman had mutually stated that they had nothing against each other, and the record does not show whether it was before or after this apparent reconciliation that McBride called upon Lot, the plaintiff in error, to get the pistol and help him.

Upon the facts detailed in the record, we are not satisfied, beyond a reasonable doubt, that the verdict of the jury is correct; and as it is manifest that a fuller examination of the circumstances attending the homicide will shed light upon the whole transaction, and establish more satisfactorily the guilt or innocence of the plaintiff in error, it is due alike to the public and to him that a re-investigation shall take place. This is the more necessary, as the charge of his Honor may, in some respects, have misled the jury. It is to be regretted that the practice has so long prevailed in this State of sending indictments for murder in the first degree in all cases of homicide. There are many cases in which it is manifest that the offense, when tried, will amount to nothing more than manslaughter, or murder in the second degree; and there is no reason, under our statutes, why the indictment may not approach nearer to the facts of the case and be sent for murder in the second degree, or for manslaughter. When the bill is found for murder in the first degree, the case, *prima facie*, is not bailable, and much trouble and expense are often incurred in making a preliminary inquiry as to

whether the accused shall be admitted to bail; and such investigations, being public, often make it difficult to select juries in the counties where they occur. Another difficulty is, that, as the indictment embraces murder in the first and second degrees, and voluntary as well as involuntary manslaughter, much time is uselessly consumed in such investigations; and the charge of the court, instead of applying the principles of law to the particular facts in evidence, seems, necessarily, to involve a disquisition upon the entire law of homicide, so complicated and difficult that the jury may well be misled by the mere accumulation of abstract propositions, although there may be no special error in the charge itself. In this case, the legal propositions so elaborately submitted by his Honor to the jury, are generally correct, but they are stated in a manner so remote from the facts, that it is not, by any means, certain that persons unskilled in the law would know how to apply them. While the Judge is not permitted to do more than state the facts and declare the law, he may well so apply the law to the facts in evidence as greatly to facilitate the investigation.

Among other things, his Honor instructed the jury that, "if a party use a deadly weapon and kill, he is presumed to have intended to have taken life." As an abstract proposition, this may be correct, but as the question before the jury was whether the plaintiff in error *used* the pistol at all; that is, as the question was whether it went off accidentally or by design in his hands, the statement, without qualification, was calcula-

ted to mislead, as the jury might naturally infer that any use or handling of a pistol where death resulted, was unlawful.

After defining voluntary and involuntary manslaughter, and pointing out the difference between the latter and homicide by misadventure, his Honor proceeded to observe, that, "in general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in the prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if [no] more was intended than a mere civil trespass, it is manslaughter."

In view of the facts, the jury should have been told distinctly, that the mere act of picking up the pistol was not in itself, unlawful; that if it was picked up for the purpose of preventing its unlawful use by either of the parties, the act was not unlawful; but that, if it was picked up for the purpose of taking part in their conflict, or of aiding or intimidating either, then the act was unlawful. The language of his Honor is obscure, and may have been understood by the jury as meaning, that, if the act of picking up, or holding, or handling the pistol, "in its consequences led to bloodshed," the plaintiff in error would be guilty either of murder or manslaughter. And yet the plaintiff in error may have handled the pistol in such a manner that led to bloodshed, and he may have been entirely innocent; as, for example, if he was attempting to let down the cock or

hammer of the pistol to prevent bloodshed, and it was discharged by accident or awkwardness and contrary to his intention.

Without quoting his Honor's charge, it may be observed that he instructed the jury as to what would be the law on various hypotheses mentioned by him predicated of the idea that the pistol was presented at Sparkman by the plaintiff in error, when there is no proof in the record to show that it was presented at all or for any purpose whatever. The charge as made, was calculated, though not intended, to create the impression on the mind of the jury that, in the opinion of the Court, there was proof to show that the pistol was actually presented; and the consequences of such a belief are too obvious to require comment. The deceased may have been shot by accident and without presenting the pistol; and it should have been clearly left to the jury to determine, from the proof, how the fact was.

Among other things, his Honor was requested in behalf of plaintiff in error, to instruct the jury that "the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence." In answer, his Honor stated: "The above is good law in a case of doubt, and I will add, that it is laid down in the same book, that when the moral spring of action is once put in motion, then even a gesture or look may be the source of encouragement and impulse to the deadliest crimes, and subject the moral action even to the highest legal penalty. In other words, when a party is moved to the perpetration of an action, a very slight cause, a word, a gesture, may

urge the party to the commission of the most deadly action." It is not easy to conjecture to what part of the case these abstract propositions were applicable; but they may well have been construed by the jury as applying to that part of the case in which the plaintiff in error was called upon by McBride to help him, and as indicating a strong opinion of the court against the prisoner.

Without considering various other errors which are urged in argument as existing in his Honor's charge, let the judgment be reversed and the cause remanded.

Wm. McGuire *v.* The State.

1. Evidence. *Deed. Proof of. Claim of title.* On the trial of an indictment for intruding into a church, Code, 4652, to allow an old unregistered deed, on proof of the signature of the maker, to be read, is not error. It is admissible to show claim of title, and with evidence of long continued possession, is proof of title.
2. Same. *Error. Must be material.* The exclusion by the Court, for want of a stamp, of evidence of a title bond, from a person claiming under the maker of the deed to the defendant, was not error, the evidence not being material.

FROM PUTNAM.

Appeal from the judgment of the Circuit Court, S. M. Fite, J., presiding.

Attorney General Heiskell, for the State, insisted that though the cause for excluding the evidence of the

bond was not the proper one, yet the exclusion of the evidence was proper on other grounds.

The evidence showed the church in possession under a deed, for twenty years before the bond was given. The bond, if produced, would have been an inferior equitable title against the elder legal title. It was not even an innocent purchase, for want of the legal title; or without notice, for the possession of the church was notice.

The evidence was not material. If it were a legal title, it would not justify an *entry* upon the *possession* of the church.

It was proper to admit the deed proved by witnesses. An objection was taken to its registration, which was sustained; then the handwriting of the maker and of a subcribing witness was proved, and the deed was allowed to be read, the objection being renewed, but no new or specific grounds stated. If the specific objection had been taken, that the subscribing witnesses were not produced, it might have been fatal. But the objection, as made, is bad: 2 Head, 121; 3 Head, 329; 1 Swan, 59, 174, 333; 10 Hum., 18, 19; 7 Hum., 13; 8 Hum., 152.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiff in error was indicted, in the Circuit Court of Putnam county, for moving into a house used as a church by a worshiping congregation of Cumberland Presbyterians. He was proved guilty, and appeals to this Court.

The prosecution is based upon Sec. 4652, sub-sec. 3, of the Code, which makes it a misdemeanor "to move into any tent, out-house or other building, belonging to

any religious or worshiping assembly, without leave from the person in charge."

The proof shows that a congregation of Cumberland Presbyterians, known as the Hopewell Congregation, had used the grounds where the church is situated as a camp ground, from 1844 until 1854, when the house was built; that plaintiff in error moved into it in March, 1870, up to which time it had been used as a place of worship. It was further proved that plaintiff in error moved into the house without the leave of the Elders of the church, who had charge of it. The State offered to read a deed for the house and ground, made in 1844, by Daniel Campbell, to the Cumberland Presbyterian Society, for the land, including the house, for purposes of worship. The reading of the deed was objected to, because it was not properly proven and registered; which objection was sustained. The State then proved the signature of Daniel Campbell to the deed, when it was allowed to be read over the objection of the plaintiff in error. There was no error in allowing the deed to be read, for the purpose of showing that the religious congregation had held and claimed the premises from its date in 1844 until it was intruded into by plaintiff in error. There was really no necessity for reading the deed; the long-continued possession was enough.

Plaintiff undertook to show that he moved into the house under an equitable title, based upon a title bond made to him in 1866, by W. S. Saylors, who claimed the land, including the premises in controversy, by conveyances from Daniel Campbell; but none of the conveyances were produced, nor did plaintiff in error produce

his title bond; but, upon proof that it was lost, offered to prove its contents. This was objected to by the State, and the secondary evidence rejected by the Court, because it was shown that the lost bond was not stamped.

The rejection of the secondary evidence for the reason given by the Court, was erroneous, under the holding of this Court on the subject of stamps. But the plaintiff in error was not injured by the exclusion of the proof. If he had had his title bond, it could not have availed him anything. The Hopewell Society held the legal title, and had been in actual possession more than twenty years, when plaintiff in error bought, and took a title bond. The title of the Society was perfect, and plaintiff in error could not have justified his taking possession under his title bond, if he had produced it before a jury. On this ground, its rejection as evidence was not erroneous. It was not intended by the Legislature that questions of title to real estate should be tried upon an indictment for moving into church buildings. The State had shown that the Hopewell Society was rightfully in possession of the house for purposes of worship, and that their possession had been continuous for more than twenty years. Under such circumstances, the plaintiff in error could not, in violation of the law, move into the house under a claim of title, for the mere purpose of raising an issue as to the title; and especially could he not do this when he was undertaking to controvert a legal title, backed by long possession, by a lost title bond, resting on no legal conveyance, as far as this record shows. There was, therefore, no error of which plaintiff in error

can rightfully complain, in the rejection of the evidence as to the contents of the title bond.

The charge of the Circuit Judge was entirely unexceptionable, and the jury were well warranted in finding a verdict of guilty.

The judgment is affirmed.

THE STATE, ex rel., v. ELIJAH JAMESON.

BASTARDY. *Indemnity of county.* A bastardy proceeding, which does not show that the bastard is likely to become a county charge, is defective, and will be quashed. The object of the law is to indemnify the county.

Cases cited: *Edmonds* v. *The State*, 5 Hum., 96.

Code cited: 5366, 5369, 5374.

FROM ROBERTSON.

In the Circuit Court, before JOHN A. CAMPBELL, J.

Attorney General HEISKELL, for the State.

JOHN E. GARNER, for the defendant, cited Code, 5369, 5370.

SNEED, J., delivered the opinion of the Court.

This was a proceeding under the bastardy laws, quashed in the Circuit Court of Robertson county, because it does not appear in the proof that the bastard was likely to become a county charge. The relator has brought the case by appeal in error to this Court.

The State, ex rel., *v.* Elijah Jameson.

There is no error in the judgment of the Circuit Court in quashing the proceeding.

It appears in the proof that the child was born in Robertson county; but it no where appears that it is likely to become a county charge.

By the express provisions of our statutes, the bastardy laws are intended for the indemnity of counties against the charge of supporting bastards: Code, 5366, 5369. And by the provision of the last section cited, the County Court is forbidden from making any provision for a bastard, except when he or she is, or is likely to become, a county charge. It results that the court can take no action against the putative father, unless it appears that the child is, or is likely to become a county charge. As this does not appear in this case, the judgment of the Circuit Court was thus far correct. But the Court, upon quashing the proceedings, should have remanded the cause to the County Court for a trial *de novo*. There is no proof that the mother, who is a colored woman, is able to maintain the child, and save the county harmless. The contrary might be made to appear upon another investigation in the County Court. With this view, the cause is remanded to the County Court for further proceedings: *Edmonds* v. *The State*, 5 Hum., 96. The costs will be paid by the County of Robertson: Code, 5374.

Granville Wilcox *v.* The State.

GRANVILLE WILCOX *v.* THE STATE.

1. HORSE STEALING. *Act of* 1865, *c.* 5, *repeals Code* 4686. The first Section of the Act 17th May, 1865, c. 5, making horse stealing capital, is a repeal by implication of the Code, 4686, as to all offenses committed since its passage. The effect of the 4th Section is only to prevent the Act from operating as a statutory pardon of offenses committed before the Act.

2. CONSTRUCTION OF STATUTES. Where a literal construction of a section will render it repugnant to the provisions of another section, it shall be so construed, if possible, as to preserve both in operation.

3. SPECIAL COURTS. *Criminal Court of Montgomery.* The Act of 1870, c. 115, "To establish a Criminal Court for the county of Montgomery," is constitutional.

4. INDICTMENT. *Duplicity.* An indictment for horse stealing which charges in the same count that the defendant did *take* and *steal* one mule, &c., is not double; the statute making it indictable to "take or steal."

5. EVIDENCE. *Substantive Felonies.* It is error to prove against a defendant a felony distinct from that for which he is on trial.

6. CHARGE OF COURT. *Instructions as to evidence.* It is error for the Court to charge the jury that "when there is conflicting testimony it is for you to determine, under your oath, who, and what testimony, you will believe," without more. He must instruct them as to the rules by which testimony is to be weighed.

7. LARCENY. *Recent Possession.* It is error to charge the jury, that recent possession of property proved to have been stolen, unexplained, and in the absence of previous good character, is plenary proof of guilt, and the jury can have no reasonable doubt.

8. INFAMY. *Horse Stealing.* The crime of horse stealing is not one of those to which infamy and its disqualifications are attached by the Code, 5226, 5227.

9. ERROR. *Judgment of the Supreme Court.* It seems that if the court below pronounce an erroneous judgment on a verdict, this court can pronounce the proper judgment.[1]

Cases cited: *Roberts* v. *The State*, 2 Tenn., 425; *State* v. *Ailey*, *ante*, p. 8;

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[1]See *State* v. *Steele*, *post.*

Granville Wilcox *v.* The State.

Lancaster v. *State*, 3 Cold , 343; *Shaw* v. *State*, 3 Sneed, 88; *Kinchelow* v. *State*, 5 Hum., 12.

Code construed, 5226, 5227; Repealed, 4686.

FROM MONTGOMERY.

Special Criminal Court, THOS. W. KING, J., presiding.

J. M. QUARLES, for the prisoner, insisted, that there was no legally constituted grand jury, the venire being returnable to the second Monday in September, 1870, when by law the court is to be held on the 1st Wednesday of each month. That the Act of 1865, c. 5, created in this respect, two offenses, one to "take," the other to "steal," and the indictment could not join the two: *Blackburn* v. *State*, 2 Cold., 235; *Whiteside* v. *State*, 4 Cold., 175. To take involves no asportation, to steal does. Error to admit proof of distinct felony: *Kinchelow* v. *State*, 5 Hum., 9; *Stone* v. *State*, 4 Hum., 27; *Shaw* v. *State*, 3 Sneed, 86; *Lancaster* v. *State*, 3 Cold., 339. That the Criminal Court at Clarksville is not a constitutional court: Acts of 1870, p. 175; Constitutions of 1834 and 1870, Art. 6, Sec. 1, 1870, Art. 6, Sec. 1.

Attorney General HEISKELL, for the State.

NELSON, J., delivered the opinion of the Court.

The plaintiff in error was indicted in the Criminal Court of Montgomery county, for feloniously taking and carrying away one large bay horse mule, the property of Elijah Lockert. He was convicted on his trial,

and sentenced to thirteen years confinement, at hard labor, in the penitentiary; and it was also adjudged that he be rendered infamous and disqualified to give evidence, or exercise the elective franchise, or hold any office under this State, and that he pay the costs of this prosecution, &c.

The indictment is founded on the Act of 17th May, 1865, c. 5, sec. 1, which provides "that whoever shall take, or steal, any horse, mule or ass, shall, on conviction thereof, suffer death by hanging; provided, the jury before whom the case is tried shall, if they think proper, commute the punishment to imprisonment in the penitentiary for the period of not less than ten nor more than twenty-one years."

The 4th section contains a proviso "that nothing in this Act contained shall be construed as repealing the laws now in force for the punishing of the offenses mentioned in this Act; but all persons who have heretofore committed any of the offenses mentioned in this Act, shall be tried under the existing laws, and, if convicted, shall be punished as now prescribed by law." The offense of horse stealing, as then prescribed by law, is thus defined and punished: "Whoever shall feloniously take, or steal, any horse, mule or ass, shall be imprisoned in the Penitentiary not less than three nor more than ten years." Code, 4686.

Applying well known rules of construction to these statutes, we hold that the first section of the Act of 1865 *does* repeal the Code, 4686, so far as any of fenses, within the purview of the statutes, have been committed since 17th May, 1865; but the intention of

the Legislature, in the said fourth section, was, to continue the old law in force as to all offenses committed previous to the 17th May, 1865, and to allow trial, conviction and punishment under it.

The first section of the act of 1865 is inconsistent with the section quoted from the Code, and therefore repeals it. See *Roberts* v. *The State*, 2 Tenn. R., 425, marg.; Cooper's Overton, 769, foot p. The proviso in the 4th section, "that nothing in this act shall be so construed as repealing the laws now in force," &c., must be taken in connection with what follows in the proviso, and as meaning that the previous laws are to remain in force as to offenses committed before 17th May, 1865.[1] Any other construction would make the proviso so repugnant to the first section as utterly to destroy it, and would defeat the Legislative will; and the first section and the proviso should, with the view of giving effect to the will of the Legislature, be so construed as that both provisions may stand. In *Bennett* v. *The State*, 2 Yer., 73, it was ad-

[1]The same point arose in *Gray* v. *The State*, Nashv., 1871, Feb. 15. in which it was disposed of as follows: "It is * * insisted for the prisoner, that the Judge erred in telling the jury that they must fix his punishment according to the provisions of the first section of the act of 1865, c. 5, and that he ought to have told them that, under the *proviso*, they had a right to fix his punishment according to the Code, 4686. The charge of the Judge in this respect, was correct. The first section of the act of 1865, as to the punishment of feloniously taking or stealing any horse, mule or ass, is imperative on the jury, and being directly in conflict with the Code, 4686, repeals the same. The *proviso* to the fourth section of the act of 1865 was intended to leave the section, 4686, of the Code, in force as to the punishment of the offenses enumerated in the act of 1865, which had been committed before the passage of the act of 1865. The proviso is not framed in exactly artistic language, but the intention and object are too obvious to admit of serious doubt." NICHOLSON, C. J.

mitted that affirmative statutes often repeal each other by implication; as was effected by the first section of the act of 1865; but it is correctly said in the same case that "when it is manifestly the intention of the Legislature that a subsequent act of Assembly shall not control the provisions of a former act, the subsequent act shall not have such operation, even though the words, taken strictly and grammatically, would repeal the former." This rule applies with peculiar force to the proviso in the third section, which, construed literally, would defeat the intention of the Legislature, that intention being two-fold: first, to raise the grade of the offense of horse stealing to a capital crime; and, secondly, to continue the former statute in force as to all offenses committed previous to its passage.

We are unable to perceive that the act of July 6, 1870, c. 115, p. 175, is in conflict with the Constitution of 1834 or 1870. Article 6, sec. 1, of each Constitution, authorizes the Legislature from time to time, to ordain and establish inferior courts; and we are not satisfied that the power to establish a criminal court was not rightfully exercised in this, as it had been previously in various similar cases.[1]

[1] This point was also decided in *Gray* v. *State*, Nashville, Feb. 15, 1871, as follows: "It is * * suggested that the act of July, 1870, conferring criminal jurisdiction on the County Court of Montgomery county, and providing for the election of a Judge and defining his powers and duties, is in violation of the Constitution of the State, adopted in 1870."

This question was decided in the case of *Moore* v. *The State*, 5 Sneed, 510. That decision was made under the Constitution of 1834, but we are unable to see that the Constitution of 1870 contains any provisions which conflict with that decision. On the contrary, it may be assumed that the Constitution of 1870 was made with a knowledge of that decision, and with

Granville Wilcox *v.* The State.

The objection that the indictment is double, is untenable. Although the language of the statute is, "take or steal any horse, mule," &c., the offense is one and the same: See 1 Bish. Cr. Law, 4th Ed., § 803; *State* v. *Arnold Ailey*, *ante*, p. 8. It is difficult to imagine how any one could feloniously take a horse without stealing him, or feloniously steal without taking. The indictment would have been more accurate, perhaps, if it had charged, according to the old form, that the defendant feloniously stole, took and rode, drove or led the mule away, instead of charging that he carried him; but this is doubtless good under the Code.

In the progress of Stephen Cole's examination as a witness, the record states as follows, viz:

"*Question by State's Attorney.*—Did you have a mule stolen from you about this time? Objected to by defendant's counsel, and the objection sustained.

"*Question by same.*—Did you lose a mule about the time this mule was stolen? the witness having stated the exact date. This question was objected to by defendant as irrelevant and prejudicial. The Court permitted the State to prove that Stephen Cole lost a mule about that time, which Stephen Cole did prove, in order to fix the time this one was stolen. In answer to defendant's counsel, witness stated that he was prosecuting defendant for stealing his mule, on an indict-

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the intention of ratifying the power therein conceded to the Legislature, of establishing such inferior courts. While such courts are subject to the repealing or amending power of the Legislature, they are constitutional, and the judges thereof are possessed of all the powers and jurisdiction conferred on them by the Legislature. NICHOLSON, C. J.

ment now pending in this court. The witness stated: My mule was first missed on Saturday morning; I looked for it to haul wood with, and could not find it," &c., &c.

No rule of criminal law is better established than that the evidence shall be confined to the case in issue; but when guilty knowledge, in its technical sense, is part of the charge contained in the indictment, as in cases of receiving goods, knowing them to be stolen; or passing counterfeit money, knowing it to be counterfeit, and the like, evidence of other acts, similar to those charged in the indictment, is admissible to establish this most important allegation in the indictment. In this case, evidence as to the loss of another mule by a person not named in the indictment, and at the same time as the mule therein mentioned, was calculated to prejudice the defense. Time could have been proved without referring to another criminal charge. The cross-examination shows that, when the witness spoke of the loss of his mule, he referred to another felony of which the defendant stood accused, and the inadmissibility of the evidence was thus clearly manifested, and falls within the general principles stated in *Lancaster & Smith* v. *The State*, 3 Cold., 343, 344; *Shaw* v. *The State*, 3 Sneed, 88; *Kinchelow* v. *The State*, 5 Hum., 12.

It is scarcely probable that without any cross-examination the jury could have understood the "loss referred to as relating to any other than a stolen mule, and the defendant was impelled, by the very nature of the question, to make this manifest.

There are several propositions in his Honor's charge to the jury which we hold to be erroneous as stated.

"1st, it is said that when there is conflicting testimony, it is for you to determine, under your oath, who and what testimony you will believe. The Court can lay down no rule as to this, because it is a matter of judgment and conscience for the jury alone, as are all the facts and circumstances of the case." There was evidence in the cause tending to discredit Sylvester Lewis, a man of color, who was a material witness for the State, and who denied making a statement at Chris. Hickerson's saloon, in the hearing of the witness, to the effect that "the mule was found in my [Lewis'] possession, and that I [Lewis] must tell some tale to save myself." Witnesses were also called to impeach the impeaching witness. Under these circumstances, the charge of his Honor was calculated to impress the minds of the jurors with the belief that they could exercise an arbitrary and uncontrolled discretion as to the witnesses to whom they would give credit. Such is not the province of the jury. The rules of evidence are fixed and established, and should in all cases of conflict, be stated to the jury for their guidance: as, for example, that in forming their opinion as to the credit of witnesses, they may look to the proof as to general character, if there be any; to the manner and demeanor of a witness; the consistency or inconsistency of his statements; their probability or improbability; his ability and willingness to speak the truth; his means of knowledge, and other criteria which may aid in the formation of a satisfactory conclusion. Such instructions may be appropriately given without invading the province of the jury, whose duty it is to weigh every part

of the evidence, and whose "judgment and conscience" may often be materially aided by the enlightened instructions and superior knowledge of the Court.

2. His Honor instructed the jury that "recent possession of personal property, proven to have been stolen, unexplained, and in the absence of previous good character on the part of the defendant, is *plenary* proof of the guilt of the person in whose possession the property is found, and the jury can have no reasonable doubt. If, from the whole body of the testimony such possession is explained; or if a good character be proven, this presumption of law would be rebutted and would not exist." As the record shows that the prisoner proved a good character, it is possible that this charge may not have operated to his detriment. But it is hazardous to speculate as to what an effect an erroneous charge may produce. The recent possession of stolen property can not correctly be said to afford plenary proof of the guilt of the prisoner, although it may be unexplained. It creates a strong presumption of guilt, which, like any other presumption, may be rebutted by facts and circumstances, and of the facts and circumstances the jury is to judge. And it was an invasion of the province of the jury for his Honor to declare that upon a given state of facts they could have no reasonable doubt. This was in effect, a determination by the Court as to the effect of evidence instead of the jury.

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4. No judgment of infamy or disqualification to hold office or exercise the elective franchise, is prescribed by the Act of 1865, c. 5. The offense of horse steal-

ing is not specially mentioned in the Code, 5226, 5227, authorizing the judgment of infamy and disqualification, although larceny, receiving stolen property, stealing bills of exchange, and other acts of stealing, are there especially enumerated. We are inclined to the opinion that although the offense of horse stealing would be included within the common law definition of larceny, yet as the Legislature has made it a separate and distinct offense in the Code and in the said Act of 1865, and as other acts of stealing are particularly named in Sections 5226 and 5227, that the judgment provided for in said sections can not be pronounced in a case of horse stealing. It can not be doubted that such an offense is within the spirit of those sections, but a judgment of such serious consequences can not be pronounced without direct authority of law, and it is beyond all question that it is not authorized by the Act of 17th of May, 1865.

Were this the only error in the record, it is probable that this Court could, under the provisions of the Code, reverse the judgment and pronounce the judgment which should have been pronounced on the finding of the jury, but it is not necessary to discuss that question, as the case must be remanded. We reverse the judgment for the other errors of law, without pronouncing any opinion whatever upon the facts.

John W. Vincent *v.* The State.

JOHN W. VINCENT *v.* THE STATE.

1. EVIDENCE. *Witness. Want of understanding.* An illiterate colored witness, of the age of 13 or 14, stating on examination as to her capacity, that if she swore a lie she would go to the bad world, held competent to testify.[1]

2. SAME. *Discrepancies in statements of witnesses.* Immaterial discrepancies in the statements of witnesses, do not affect their credibility, unless there is something to show that they originate in willful falsehood.

3. TRANSCRIPT. *Several indictments.* There being two indictments in the record, and it not appearing which of them the prisoner was tried upon, one being invalid, purporting to have been found at a time when no court was held, it was held that the conviction was upon the other.[2]

4. INDICTMENT. *Attorney General, pro tem.* The fact that an indictment is signed by an Attorney General, *pro tem.*, whose appointment is not shown by the record, is not material after a verdict on a plea of not guilty: Code, 5242.

5. LARCENY. *Value of Notes. Proof of.* If it be necessary to prove the value of United States treasury notes stolen, it is sufficient proof of value, that the defendant declared that he had spent them.

6. NEW TRIAL. *Want of diligence.* A new trial will not be granted, to enable a defendant to procure evidence of which he was cognizant before the trial, where he has made no effort to procure a continuance that he might obtain the testimony.

Cases cited: *Baldwin* v. *State*, 1 Sneed, 416; *State* v. *Shaw*, 3 Sneed, 86.

FROM WHITE.

Circuit Court. Before S. M. FITE, J.

Attorney General HEISKELL, for the State.

[1] See *State* v. *Logston*, February 7, 1872. acc.
[2] See *Anderson* v. *State*, *ante*, p. 86.

John W. Vincent *v.* The State.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff in error was convicted of larceny at the October Term, 1870, of the Circuit Court of White county, and a new trial having been refused, he appealed in error to this court.

The charge was, for stealing from Isaac Hudgins, the prosecutor, who is a colored man, one ten dollar, one five dollar, one two dollar, bank notes, commonly called green backs, two silver dimes, and one promissory note on Charles Lowrey for forty-four dollars, alleging their value.

Upon the trial Sally Matlock, a colored girl between 13 and 14 years of age, was introduced as a witness for the State, and upon preliminary examination by the court, stated, that no one ever told her what would be done with her, in this world or the next, if she swore falsely, and she did not know what would become of her. Upon being asked further what would become of her hereafter, if she swore a lie in this case; whether she would go to the good world or the bad world; she replied, if she swore to a lie, she would go to the bad world. She was then allowed to testify.

It is now insisted, that the answers of the witness, upon preliminary examination, did not disclose a consciousness of the obligation of an oath, nor of the consequences of swearing falsely, and that her testimony should have been rejected, upon the ground of her incapacity.

There is no precise age within which witnesses are absolutely excluded upon the presumption that they have not sufficient understanding to testify.

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At the age of fourteen years, a witness is presumed to have sufficient discretion and understanding to testify; under that age, such presumption does not arise; but the Judge usually examines him to ascertain the degree of his understanding; and if the witness manifests, in the opinion of the Judge, sufficient natural intelligence, and understands the nature and obligation of an oath, he may be examined, whatever may be his age: 1 Greenleaf's Ev., 367. From the answers of the witness in the preliminary examination, we can not say that the Circuit Judge exercised the discretion committed to him unwisely. She seems not to have understood the signification of the word "falsely," but when the question was asked her in more familiar language, responded promptly and intelligently.

But it is said, this witness is contradicted by the testimony of a negro woman, Margaret Officer. Sallie Matlock stated that she was at the Ward House, and Isaac Hudgins came into Margaret Officer's room and laid down and went to sleep; Margaret Officer and others were sitting outside of the house, and she, Sallie, was sitting near the window, where she could see Ike as he slept, and was within a few steps of him; that defendant, Vincent, came into the house, and went and felt Isaac Hudgins' pockets first, and then took his money out of his sock leg; she was looking at him at the time, and told Margaret Officer that Vincent was stealing Isaac Hudgins' money There was no one in the house at the time.

Margaret Officer states that, on the day the money was said to have been stolen she was there; that Isaac

Hudgins came there and laid down to sleep, then John Vincent came in and went into the room. Sallie Matlock was sitting by the door, she was not at the window; that she (Margaret) was near a window that was nailed up so a person could not see in. That Henrietta was in the room at the time. Sallie told her that Vincent was taking Ike's money, and she (Margaret) told her to hush, that Vincent would kill her.

The alleged contradiction of Sallie's statement is, that she was sitting by the door and not at the window, and could not have seen in the window, as it was nailed up. Sallie states she was sitting near the window, but she does not say that she saw through the window, and it is not shown how far apart the window and door were. She may have been near both. But it is not material that her statement should be strictly accurate as to where she sat, whether near the door or window. From the statement of Margaret, Sallie's position near the door was more favorable for seeing what took place in the room than it would have been at the window; there is, therefore, no motive for a willful misstatement of the place she occupied at the time. Henrietta may have been in the room at the time, without Sallie's knowledge. But both these facts are immaterial, and do not affect the credibility of either witness, unless shown to have been made with a knowledge of their falsity. Such immaterial discrepancies can not be held to be an impeachment of the credit of the witness. Both witnesses agree in the more important and material facts: that

Hudgins went into the room and laid down and slept; that Vincent afterwards went into the room where Hudgins was sleeping, and while he was in there, Margaret said Sallie told her he was taking Ike's money, and Sallie swears she saw him take it.

That Vincent got the money there is no doubt. He admits it, but says he won it at cards. He says Ike had shown him and others his money that morning, and he knew that Ike had it in the leg of his sock.

Defendant introduced a witness, and proves by him that the defendant, at the blacksmith shop, proposed to Ike to play with him at cards for money, on the day the money was said to have been stolen, and witness inferred the proposition was accepted from what took place, but can't say for certain that Hudgins agreed to play. The witness left, and could not say whether they played or not.

He further states that French Crawford, Tom Stewart, and perhaps others, were at the shop. French Crawford states that, the day the money was said to have been stolen, Hudgins pulled his pocket-book out of his sock and showed his money, at the blacksmith shop; that he had a ten, a five and a two dollar bill, all greenback, and 20 cents in silver and some papers; one a note on Charles Lowrey.

Vincent (the defendant), James McGinnis and Tom Stewart, were present. Defendant had a pint of brandy and they all drank; that Vincent proposed to play cards; did not hear Ike agree to play; no cards were played.

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James McGinnis (colored) corroborates substantially the testimony of French Crawford, and states there was no card playing at the shop.

There is no testimony in the record to sustain the defense that the money was won at cards.

The pocket-book contained, beside the money, a note on Charles Lowrey for $44.10, and a tax receipt. The defendant admitted that he got the money and the note, but stated to Lowrey that he had never seen the pocket-book nor tax receipt. Afterwards, he told Lowrey that he won the money and part of the note, and while playing a squabble got up and he snatched the note, got the pocket-book too, and the tax receipt was in it; and that he had spent the money. Ike Hudgins (the prosecutor) testified that he did not play cards with the defendant, and that his pocket-book, containing the money, note and tax receipt, were taken from him while he was asleep at Margaret Officer's.

It is also insisted for defendant, that there being two indictments in the record, and it not appearing upon which the conviction was had, and one of them purporting to have been found at March Term, 1870, when no court was held, that this is an error for which the judgment should be reversed.

We are of opinion that it sufficiently appears that the conviction was had upon the indictment which purports to have been found at the May Term, 1870, and that the other indictment was re-committed to the Grand Jury upon the motion of the Attorney General, perhaps for the correction of the very error which is here complained of.

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It appears, also, that the indictment is signed by A. F. Capps, Attorney General, P. T., and it is objected that the record does not show any appointment of a *pro temp.* Attorney General. It is provided in Section 5242 of the Code, that where a person indicted for a criminal offense pleads not guilty, and is tried and convicted, he shall not be entitled to a new trial, or to an arrest, or reversal of the judgment, because the indictment was drawn by an Attorney General *pro tempore,* and the Clerk omitted to enter his appointment upon the minutes of the court.

It is also insisted for defendant, that there is no proof of the value of the greenbacks or the note on Lowrey, alleged to have been stolen, and that for this, a new trial must be granted. This objection is sufficiently answered by the proof by two witnesses, that defendant had admitted to them that he passed or spent the money he got of Hudgins. The fact that the bills passed currently is *prima facie* evidence of their genuineness, and that they were of the value imported on their face: 1 Sneed, 416; 3 Sneed, 86; 2 Wharton, § 1761, 6th edition, m.

Upon the motion for a new trial, the defendant read his own affidavit and those of several other persons.

None of these affidavits, except that of defendant, states any fact that contradicts the material facts established on the trial. The defendant shows that he was aware of what he could prove by these several affiants before the trial. He made no effort to procure their testimony, nor did he offer to continue the cause to procure their testimony, and we can not see any sufficient

grounds disclosed in the affidavits for granting a new trial.

Upon a careful examination of the whole testimony, we are of opinion that the verdict of the jury is well sustained by the proofs; that the charge of the Court was correct, and we affirm the judgment.

Reuben Mathis *v.* The State.

1. House-breaking. *Act of* 1865, *c.* 5, *s.* 2. House-breaking, under the act of May 17, 1865, c. 5, s. 2, means breaking into a mansion house.
2. Judge. *Competency.* A Judge who, previous to his election as Judge, sent, as Attorney General, the bill of indictment against the prisoner, is not competent to sit upon the trial of that indictment.

Case approved: *Palmer* v. *The State*, 7 Cold., 82.

FROM STEWART.

In the Circuit Court, before James E. Rice, J.

J. M. Quarles, for the prisoner, cited 1 Plowd., 171; 2 Saund., 401, n. 2; 1 P. Wms., —; Bouv. Law Dic., Title "House." Insisted on the incompetency of Judge Rice, and cited Code, 3913; *Fout* v. *State*, 3 Hay., 94.

Attorney General Heiskell, for the State, conceded the incompency of Judge Rice, under the Const., Art. 6, s. 11, and the Code, 3913, sub-sec. 4.

Reuben Mathis *v.* The State.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiff in error was indicted in the Circuit Court of Stewart county for house-breaking. At the December Term, 1870, he was tried, Judge James E. Rice presiding when he was convicted and sentenced to the Penitentiary for ten years. From the judgment rendered, he has appealed to this Court.

The proof shows that the house broken into was a store house; and there is no proof that there was any person living or lodging in it. This Court held, in the case of *Palmer* v. *The State*, 7 Cold., 82, that the offense of house-breaking, as defined in the statute, means the breaking into a mansion house. We concur in the correctness of that decision; and hence, we hold that the defendant was improperly convicted, and that the Circuit Judge erred in not granting a new trial.

It appears from the record, that the indictment was signed by James E. Rice, Attorney General, and that he presided as Judge on the trial of the cause. This is assigned as error, and we think, correctly. The Constitution, Art. 6, s. 11, provides, that no Judge shall preside in any cause in which he may have been of counsel; and section 3913 of the Code, contains a similar provision. We are unable to discover any reason for prohibiting a Judge from presiding in a civil cause in which he may have been of counsel, which does not apply on the trial of a criminal cause. The Constitution makes no distinction, and we are not authorized to make any.

Other errors, as to the admission and rejection of

evidence, have been relied on for the defendant; but we deem it unnecessary to notice them, as the judgment must be reversed for the errors stated, and the cause remanded for another trial on a proper indictment.

Louisville and Nashville Turnpike Company *v.* The State.

Roads. *Signs at railroad crossings.* A turnpike company is not the overseer of a public road within the meaning of the Code, 1223, requiring notices to be placed at every crossing of their roads by a railroad, to "look out for the cars," &c.

Case doubted: *State* v. *M. & A. of Loudon*, 3 Head., 263.

Code construed: 1223.

FROM SUMNER.

Circuit Court, Thomas Barry, Ch., presiding by interchange. June Term, 1867.

J. J. Turner, for the plaintiff in error.

Attorney General Heiskell, for the State.

Nelson, J., delivered the opinion of the Court.

The presentment charges that "the Louisville and Nashville Turnpike Company, a body corporate, and owning and controlling a turnpike road in the county afore-

said, on the 1st day of June, did then and there, fail to put up a sign marked, 'Look out for the cars when you hear the whistle or bell,' at the crossing of the turnpike road with the Louisville and Nashville Rail-road, contrary to the form of the statute," &c. Defendant demurred to the presentment. The demurrer was overruled, judgment pronounced, and an appeal prosecuted to this Court.

The case of *The State* v. *Mayor and Aldermen of Loudon*, 3 Head, 263, has been cited as an authority to support the action of the court below, and certainly goes far to sustain it, as it holds that a municipal corporation is an overseer within the meaning of the Code, 1116, sub-sec. 2, which is almost identical with section 1223, under which this presentment was framed. That section declares that "every overseer of a public road shall put up, at every crossing of any railroad and such public road, a sign, marked, 'Look out for the cars when you hear the whistle or bell,' and the County Court shall appropriate money to defray the expenses of such sign." The succeeding section subjects the overseer to present-ment or indictment.

While we have no doubt that the owners of a turn-pike road *ought* to be required to perform the same duty imposed upon the overseer of common roads, in putting up the sign described, we hold that the case in 3 Head goes to the very verge of the law, if not entirely beyond it. The statute evidently relates to the overseers of common roads, upon which overseers are annually appointed by the County Courts, under the Code, 1198. It does not embrace a turnpike chartered

by the Legislature as private property, and upon which no overseers are appointed by the County Courts. The provision, that the County Courts shall appropriate money to defray the expenses of the sign, conclusively shows that the statute had reference to county roads proper. Had it been otherwise, such expenses might and should have been provided for in the charter.

We are not disposed to create crimes or misdemeanors, by judicial construction; and therefore adhere to the well-known rule, that penal statutes shall be construed strictly: 1 Sharsw. Bl. Com., 88, m.; Sedgw. on Stat. and Con. Law, 324; Dwarris, 634, m.

Let the demurrer be sustained, and the judgment reversed.

THE STATE *v.* WILLIAM GREEN.

INDICTMENT. *Averment in the disjunctive, bad.* A charge that the defendant "did carry a belt, *or* pocket pistol, *or* revolver," is bad for uncertainty.

FROM WILSON.

Criminal Court. WM. H. WILLIAMSON, J., presiding.

Attorney General HEISKELL, for the State, insisted that the word *or* was not in this case an alternative

conjunction, expressive of one of two things, but of two or more descriptions of the same thing. The statement in the indictment is, that the defendant did carry a belt or pocket pistol, or revolver. These may all be different descriptions of the same revolver, which may be at the same time, a belt pistol or a pocket pistol. A heavy stick or bludgeon, is a double description.

It may mean, however, that he carried one of two kinds of pistol, and it is said this is uncertainty. It is admitted that a charge of carrying a belt pistol, and a pocket pistol and a revolver, would be certain. Practically, the alternative is the most certain, for that binds the State to one of two things. The conjunctive has the form of certainty, but none of the reality. The State may, under it, prove: 1st, a belt pistol; 2d, a pocket pistol; 3d, a revolver; 4th, two pistols, belt and pocket; 5th, two, belt and revolver; 6th, two, pocket and revolver; 7th, three pistols, belt, pocket and revolver. This is "certainty in law," which leaves the prisoner uncertain in fact which of *seven* alternatives is to be proved. The other is uncertainty, which leaves it at least certain that one of *three* things is to be proved. In civil pleading, you may by the same process, leave it utterly doubtful which of a million of trees a defendant cut, and yet you have legal certainty, because you falsely state that he cut them all; but if you state that he cut one of two certain trees, the uncertainty is too great to be tolerated. This false and absurd rule deserves to be discarded. If an alternative is allowed in fact, let it be done avowedly, not under cover of a lie. If a witness declares that he saw the defendant with a pistol, but did

not see it well enough to distinguish which kind, that is sufficient certainty of proof, but the certainty required in pleading would require him to swear that it was all three.

The Code allows the use of ordinary and concise language: 5114. Such degree of certainty as shall enable the court to pronounce judgment upon conviction: 5117. When the common law prescribes particular and technical language, it is sufficient to describe the offense according to the general rules laid down in this chapter: 5120. The means may be charged in the alternative: 5121.

J. W. PHILLIPS, for the defendant, cited *Whiteside* v. *State*, 4 Cold., 182; *State* v. *Ailey*, *ante*, p. 8; 1 Bishop Cr. Law, § 274, 803; Archb. Cr. Pr. and Pl., p. 91, m. n. 1; *Ib.*, 88, m. n. 1; *Peek* v. *State*, 2 Hum., 84; and urged the Court not to tolerate laxity in pleading.

NELSON, J., delivered the opinion of the Court.

The presentment was intended to be framed upon the act of June 16, 1870, c. 13. It charges that the defendant "unlawfully and willfully did carry a belt *or* pocket pistol, *or* revolver," he not being an officer, or policeman, &c., &c. The presentment was quashed, on motion, and the State appeals.

Notwithstanding the able and ingenious argument of the Attorney General, in support of the presentment, we hold that the charge is in the disjunctive, and, therefore, defective and insufficient, according to *Whitesides* v. *The State*, 4 Cold., 183. See, also, 1 Wat. Arch. Cr. Pl.,

282, and notes, and 291, note 1, *et seq.;* 1 Chitty Cr. Law.[1]

The reasons for the ancient strictness in indictments, are so lucidly stated in the authorities cited, that it would be a work of supererogation to repeat them. While, in some respects, this strictness, in the language of Sir Matthew Hale, had "grown to be a blemish and inconvenience in the law and in the administration thereof," it should never be forgotten that much of the certainty required in indictments arose during the protracted struggle for liberty, against prerogative, in England, and was the shield interposed by the judicial tribunals, for the protection of the citizen against wrong and oppression. The experience of the last few years should admonish us that the barriers erected by the wisdom of our ancestors for the protection of public and private liberty, can not be maintained with too much vigilance or determination.

Affirm the judgment.

[1] In *Handaman* v. *The State,* Knoxville, Oct. 21, 1871, it was held, Nelson delivering the opinion of the Court, that this form of statement was not cured by the Code, 5122, providing that, "when an offense may be committed by different means, the means may be alleged in the same count in the alternative." That here different *offenses* are charged in the alternative. That section was intended to provide that murder might be charged to have been committed by different means, as by blows, poison or strangulation; or with different weapons in the alternative; or that the pretences by which money was obtained, might be stated in like manner and for like cases.

The State *v.* Eli Steele.

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THE STATE *v.* ELI STEELE.

1. PRACTICE. *Reasons in arrest of judgment.* The proper practice, where a party seeks to arrest a judgment, is to file reasons in arrest, pointing out specially the alleged defects in the proceedings.

2. PROFANITY AND BLASPHEMY. *When public, indictable.* Profane and blasphemous language, in a public place, in the presence and hearing of divers citizens, is indictable.

3. INDICTMENT OR PRESENTMENT. *What must be set out.* It is not necessary, in an indictment for this offense, to set out the whole conversation in which the offensive words occurred.

4. ERRONEOUS JUDGMENT. *Misdemeanor.* If the court below pronounce an erroneous judgment, this court will enter the proper judgment; as where the court below improperly arrest the judgment on a conviction for misdemeanor, this court will pronounce sentence.[1]

Cases cited: *State* v. *Graham*, 3 Sneed, 134, 140.
Code cited: 5249.

FROM FRANKLIN.

Circuit Court, July Term, 1867, before N. A. PATTERSON, J.

Attorney General HEISKELL, for the State, on the necessity of filing reasons in arrest, cited 1 Arch., 672, n., citing *State* v. *Wing*, 32 Me., 581; 2 Tidd's Pr., 917, top. No change by Code, 5242. On the main point, cited *Graham* v. *State*, 3 Sneed, 134.

NELSON, J., delivered the opinion of the Court.

[1] See *Wilcox* v *State*, *ante*, 110.

The record does not disclose for what reason the judgment in this case was arrested. The motion in arrest is general, and specifies nothing. It is certainly the better, if not the only correct practice, in civil as well as criminal cases, formally to assign reasons in arrest of judgment upon the record, in support of the motion in arrest, so that the attention of the Court, in the first instance, may be at once directed to the alleged defect in the proceedings, and that the public, through all time, may, upon examination of the record, be informed as to the grounds of its action: See 2 Tidd's Pr., 3 Am. ed., 918, m.; 3 Black. Com., 393, m.; Appendix, *Ib.*, XI; *State* v. *Wing*, 32 Me., 581; 1 Waterman's Archb. Cr. Pr., 671, 672.

The propriety, not to say necessity, of this practice, is more apparent when the cause is to be considered by a revising tribunal, whose attention should be directed at once to the reasons in arrest, assigned of record, instead of being compelled to make a critical, and often fruitless, examination of the record to find out the supposed defects.

The presentment charges that the defendant, in a public place, and in the presence and hearing of divers good citizens of the State, unlawfully uttered, published, and spoke the gross, scandalous, profane and blasphemous language therein stated, to the great scandal and common nuisance of all good citizens, &c. It was not necessary to set out the whole conversation in the presentment, but only so much of it as clearly describes the language used, and the useless *et ceteras* in the presentment may be rejected as surplusage. The offense

was held to be indictable, in an able and exhaustive opinion by Judge Caruthers, in *The State* v. *Graham*, 3 Sneed, 134, 140, and no other citation of authorities is necessary.

Reverse the judgment, let the defendant be fined five dollars, with costs, and remand the cause under the Code, 5249.

JACK SIBLE *v.* THE STATE.

1. EVIDENCE. *Admissions or Declarations.* The declarations or admissions of a co-defendant or third person, in regard to the commission of an offense, when made after the offense is commitled, are not admissible as evidence for a defendant.
2. ERROR. *Not presumed.* In the absence of a bill of exceptions, it will be presumed that there was full proof to justify a conviction.
3. VENIRE. *Want of, not material. Costs of defective transcript.* The omission of the *venire facias* in the transcript sent up to the Supreme Court, is not error, and the Court will proceed to judgment without it. But it is a fault in the Clerk to omit it from the transcript, for which his costs will be struck out.

Case explained: *Hensley* v. *State*, 9 Hum., 244.

Code cited: 5242.

FROM DAVIDSON.

Criminal Court, before JOHN HUGH SMITH, J., January Term, 1870.

JO. C. GUILD and THOS. L. DODD, for the prisoner,

cited: 1 Starkie Ev., 510; *Kirby* v. *State*, 3 Hum., 289; *Hensley* v. *State*, 9 Hum., 243.

Attorney General HEISKELL, for the State, cited *Wright* v. *State*, 9 Yer., 344, 345; *Rhea* v. *State*, 10 Yer., 260, and 1 Greenl. Ev., 280, § 233. He distinguished this case from Hensley's case, because there the admissions held to be evidence were made before the offense was committed, and cited, 1 Greenl. Ev., § 181, showing a similar distinction as to bankrupts. As to the want of a *venire*, he cited the Code, 5242.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff in error was jointly indicted in the Criminal Court of Davidson county, with one Henry Edwards, for stealing a cow.

At the January Term, 1870, upon his application, he was tried for the offense separately, and convicted, and sentenced to three years' confinement in the Penitentiary. A new trial was refused, and the defendant below appealed in error to this Court. The question made before us arises upon a bill of exceptions taken to the action of the court during the progress of the trial, in refusing to admit certain proof proposed to be made by defendant. Defendant introduced a witness by whom he proposed to prove that Henry Edwards had stated to the witness, that he (Edwards) had bought the cow from one Dillon, and that defendant, Sible, had nothing to do with the purchase, and was not in any manner interested in it; that Dillon delivered the cow, and Edwards sent to defendant to send hands to slaughter it the next morning.

Jack Sible *v.* The State.

The Attorney General objected to the foregoing declarations of Edwards, or to any admissions that he, and not the defendant, was guilty of said charge, being proved, and the objection was sustained.

This, it is insisted by the attorney for the plaintiff in error, was error, and the case of *Hensley* v. *State*, 9 Hum., 244, is cited and relied upon as authorizing the admission of the testimony offered. We think that case and this are essentially different.

The declarations were made by Edwards after the offense was committed, and he was jointly indicted with Sible for it; and while under indictment for the offense, he could not have been examined as a witness in the case, either for or against the defendant on trial, if he had been personally present in court: 1 Greenl. Ev., § 363. To allow testimony of the character proposed, would hold out temptation, and afford facilities for simulating such defense, where no real foundation for it existed.

The case of *Hensley* v. *The State*, goes quite as far as we think it consistent with the well established rules of evidence to go, and we are not inclined to extend the principle of allowing declarations of third persons to be given in evidence, either to criminate or exonerate a defendant in criminal prosecution. The proof in the case of *The State* v. *Hensley*, was circumstantial. No connection was shown to exist between the defendant and the party whose threats it was proposed to prove. The threats defendant offered to prove were made before the commission of the offense, and it was proposed to show that the party making them was in the neighborhood

when the offense was committed. We are, therefore, of opinion, there was no error in rejecting the testimony offered.

No bill of exceptions setting out the evidence heard upon the trial, is in the record, and we are bound to presume it was sufficient to warrant the verdict.[1]

The record "does not embody the *venire facias*," or contain any recitals showing its return, or the action of the court upon its return. While this omission by Sec. 5242 of the Code, is declared not to be so material as to entitle the defendant, who has been tried upon the merits and convicted, to a new trial, an arrest of, or reversal of the judgment, yet the failure of the clerk "to embody in the record the *venire facias*, is regarded as such neglect of his official duty as to operate as a forfeiture of all costs to which the clerk would otherwise be entitled: Code, 5243.

We, therefore, affirm the judgment of the Criminal Court, and direct that in the taxation of the costs, no costs shall be taxed in favor of the clerk of that court.

[1]This point is repeated in *Harris* v. *The State*, in an opinion by NELSON, J., delivered March 10, 1871: "A motion, unsupported by any reasons in arrest of judgment was made and overruled, but no bill of exceptions was tendered; and it is now insisted that the judgment should be reversed because it does not appear that there was any evidence to support the verdict. To this we answer, that the Circuit and Criminal Courts of Montgomery county are courts duly established by law; that, in the absence of anything to the contrary, the proceedings are presumed to be correct; that this Court has no power to reverse them upon broad motion; that the legal presumptions are, that there was ample evidence before the jury to justify the verdict; and, if there was not, the Criminal Court would have granted a new trial. That these presumptions can only be rebutted by setting out the evidence, in a bill of exceptions, so as to show that the Criminal Court was in error, has so frequently been adjudged, in civil as well as criminal cases, in this State, that it is needless to cite authorities.

Affirm the judgment.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION.

JACKSON,.....APRIL TERM, 1871.

WILLS *v.* THE STATE.

1. JURISDICTION. *U. S. Cemeteries.* The jurisdiction of the United States over the United States Cemeteries, under the cession of 1867, c. 44, is not exclusive of the right of the State to punish offenses committed therein, nor of their right to serve process.

2. SAME. *Same. Temporary occupation of adjacent ground.* During the temporary occupation of the adjacent ground, used by the United States forces while preparing the Cemetery grounds, the jurisdiction was exclusive, in the United States, so that the State could not punish a misdemeanor committed therein during such occupation.

FROM HARDIN.

Circuit Court, March Term, 1869, J. F. MCKINNEY, Special J., presiding.

T. P. BATEMAN, for the Plaintiff in error.

Attorney General HEISKELL, for the State.

Wills *v.* The State.

NELSON, J., delivered the opinion of the Court.

The plaintiff in error was indicted and convicted in the Circuit Court of Hardin county, for unlawfully selling spirituous liquors on the Sabbath day. It was adjudged that he should pay a fine of twenty-five dollars and the costs of the prosecution; and from this judgment he prosecutes this appeal in error to this Court. The proof shows, clearly, that, on a Sunday in April, 1868, the plaintiff in error sold and received payment for "three drinks of whisky, at Pittsburg Landing; that the sale was made some forty or fifty yards outside of the cemetery inclosure at that place, and outside the corner post designating the line of the Government fence, but within the lines occupied by the officers, soldiers and employès; that he was closer to the cemetery inclosure than the soldiers' tents, and between them and the inclosure; that the houses occupied by the employès were "scattered around his establishment; that there were United States soldiers, officers and employès there at the time, at work on the cemetery grounds, and the house occupied by him was put up after they were stationed there. The plaintiff in error proved that a paper, purporting to be an extract from Special Order, No. 34, which was signed "By command of Maj. Gen'l Geo. H. Thomas, A. W. Wills, Brevet Lt. Col., and A. Q. M., in charge of Cemeteries at Corinth and Pittsburg Landing," was in the handwriting of said Wills. This order states that "H. Harbert & Co., (composed of H. Harbert and C. W. Wills,) are hereby appointed sutlers for the employès in government service engaged in the construction of the

National Cemetery at Pittsburg Landing, Tennessee, and are authorized to sell merchandize, or other articles the said employès may from time to time, need."

The reading of this order was objected to on the part of the State, but the objection was overruled. Among other things, the Circuit Court instructed the jury, "if the proof showed that the selling of the liquor was within the boundary of the ten acres ceded by the State of Tennessee to the United States for a National Cemetery, that the courts would have no jurisdiction of the cause; but on the contrary, if from the evidence, the jury believed that the sale was outside of the ten acres so ceded, that the court would have jurisdiction; that the distance was immaterial, nor did it matter if the officers, soldiers and employès of the Government had their quarters around and beyond the house where the liquor was sold, and were occupying the same." The Court further charged that "a preponderance of proof was sufficient to warrant a verdict of guilty; and that, in prosecutions of this character, the law did not require such quantum of proof as would exclude reasonable doubt."

The solution of the main question depends upon the construction to be given to the Act of 9th of March, 1867, c. 44, entitled, "An Act to cede to the United States the jurisdiction over the National Cemeteries in this State, and to protect the same." The Act is framed in a very loose and inartificial manner, but its meaning can probably be ascertained with reasonable certainty. The first section provides that "the exclusive jurisdiction over the several tracts of land and parcels of ground, with the appurtenances thereto, obtained, purchased, used or occu-

pied for burial purposes, by or for the United States, hereinafter described by their names and location, *with the premises thereto attached, for officers' and soldiers' quarters, and for guards,* is hereby ceded to the United States; *Provided, however,* that jurisdiction thereof shall be retained by the State of Tennessee, so far as to punish offenders against this law, by presentment or indictment, and fine and imprisonment, as hereinafter provided."

In the description of cemeteries, no mention is made of Pittsburg Landing, *eo nomine,* but that place is described as "Shiloh National Cemetery, containing about ten acres," and we know, historically, that the two places are treated as the same. Section 2 provides, "that the exclusive jurisdiction over all tracts and parcels of land, with the buildings and appurtenances belonging to the same, including the quarters for officers, keepers, guards, or soldiers, in charge of the same, and the premises connected therewith, now, or at any time hereafter, purchased, used, or occupied by the United States, their officers, or agents, for cemeteries or burial places, within the limits of the State, is hereby ceded to the United States; and whenever such premises shall be no longer required, used or occupied by the United States, the jurisdiction of such abandoned property may revert to the State of Tennessee.

The third section exonerates the property from State and municipal taxation, until the jurisdiction shall have reverted; and provides that, "the title and possession to the said cemeteries, grounds, buildings and appurtenances shall be protected to the United States, and no process of any courts shall be permitted against the

same, or to dispossess the officers, or agents of the United States thereof, without restricting any just claim for damages or value in the form or mode provided by the United States for prosecuting the same." The fourth section provides for the punishment of any offender guilty of a voluntary injury to, or mutilation of, the graves, monuments, &c. See Pamphlet Acts, 1866 7, pp. 64, 65.

In construing this legislative grant, we are of opinion that the words, in the first section, "with the premises thereto attached, for officers' and soldiers' quarters;" and the words in the third section, "with the buildings and appurtenances belonging to the same, including the quarters for officers, keepers, guards or soldiers, in charge of the same, and the premises connected therewith," are fugitive and temporary in their nature; and in view of the nature of the thing granted, and the purposes for which the grant was made, are to be regarded as ceding to the United States, not only the jurisdiction over the ten acres of land, but jurisdiction over such of the land immediately adjoining, as was used or occupied for officers' and soldiers' quarters, and for guards or soldiers in charge of the cemetery and the buildings immediately adjacent thereto. That the grant relates only to the temporary occupation of the adjacent lands, while the cemetery and the buildings, if any, thereon and the fencing around the land, are in process of construction or repair, is manifest from the provision in the third section, that whenever such premises, (referring to the premises adjacent,) are no longer required, used or occupied by the United States, the jurisdiction of such abandoned property may revert to the State of Tennessee. There was an

obvious propriety in conferring this limited and exclusive jurisdiction, as the officers, keepers, guards or soldiers, would, most probably, be under the control of the United States, and any offense committed within the lines of their occupation, would be governed by the laws of Congress, or the army regulations. But the words "exclusive jurisdiction," must, upon any known or reasonable construction, be limited to the object and purposes of the grant; and it is not to be presumed that the State of Tennessee would yield, or that the United States would accept, the exclusive jurisdiction of all the crimes or misdemeanors committed within the limits of the cemetery, or the premises adjacent, when there is no actual occupation, on the part of the United States, by officers, keepers, guards or soldiers, for purposes connected with the cemetery. Although the State agrees, in section four, that the title of the United States shall be protected, it was not the intention so to divest the State of her soverignty as to give absolute impunity to all offenses against the State within the cemeteries and grounds adjacent, when not in the actual occupation of the United States.

To give this construction to the grant, would be to hold, that the cemetery is a "City of Refuge" for all offenders against the laws of the State. It was not the intention of the grant, that the land should be used for any other purpose than that of a cemetery for the repose of the dead; and the exclusive jurisdiction conferred, relates, alone, to the measures necessary to be adopted by the United States, from time to time, in order to effectuate this cardinal purpose. It was held, in *United States* v. *Coryell*, 2 Mason, 60, that, "the purchase of lands by

the United States, for public purposes, within the territorial limits of a State, does not, of itself, oust the jurisdiction, or sovereignty, of such State over the lands so purchased."

The Constitution prescribes the only mode by which they can hold land as a sovereign power, and therefore, they hold only as an individual when they obtain it in any other manner. In cases cited in Paschal's Annotated Constitution, 137, whether the power conferred upon Congress in the National Constitution, Article 1, Section 8, to purchase a district for the seat of Government and "to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings," was intended to include such a purchase as that under consideration, it is needless to discuss; and it may be assumed, that the acquisition, for the purposes intended, is within the spirit of that instrument. Mr. Justice Story says, that "a great variety of cessions have been made under this power, and generally, there has been a reservation of the rights to serve all State process, civil and criminal, upon persons found therein:" Story on Const., § 1225. See, also, Act of 1795, ss. 1, 2; 1828, sec. 2; Brightley's Dig., 489, sections 181, 182, 184.

From the peculiar nature of the legislative grant under consideration, and the special and only purpose for which it was made, it may be fairly implied, that the exclusive jurisdiction granted, is limited to the purposes and circumstances we have indicated. We, there-

fore, hold, that, as the proof shows that when the misdemeanor alleged in this case is supposed to have been committed, the United States had actual possession of the premises, by reason of the guard of soldiers, His Honor erred in his instructions to the jury, and should have charged that the Circuit Court had no jurisdiction of the offense.

His Honor also erred in his charge, as to the preponderance of proof and reasonable doubts. The benevolent and long cherished maxims of the law on these subjects, are applicable to criminal prosecutions of every grade, as we held in a case at the last Term in Knoxville.

Let the judgment be reversed and arrested, and the defendant discharged.

CHARLES KING *v.* THE STATE.

INDICTMENT. *Averment of time.* The Code, 5124, does not dispense with the statement of time in an indictment; it only allows a more general statement.[1]

FROM HAYWOOD.

[1] In *The State* v. *Wills*, where the indictment, found in July, charged the offense as committed on the ——— day of April, of the same year, it was held good: Jackson, May 10, 1871.

Charles King *v.* The State.

Circuit Court, May Term, 1870. Before Wm. P. Bond, J.

B. P. Boyd, for the prisoner, insisted that the indictment was defective for want of a specific statement of a time when the offense was committed, citing 1 Wharton's Cr. Law, sec. 262; *Bolton* v. *State*, 5 Cold., 651.

Attorney General Heiskell, for the State, cited the Code, 5124, and insisted that the first clause of that section dispensed with the allegation. "The time at which the offense was committed need not be stated in the indictment," and that the remainder of the sentence, was only to allow a more general statement, where time was alleged, than would be good at common law. If it had not been intended to dispense with the statement altogether, it was only necessary to say: It is sufficient in an indictment to state, generally, that the offense was committed before the finding of the indictment. This would have made the change, which, on the hypothesis of the prisoner's counsel, the Legislature intended.

The time alleged in an indictment need not be proved as laid, and the principle of pleading in the Code is, that what need not be truly alleged, need not be alleged at all. In regard to venue, which is much more material, the next section dispenses with that in unquestionable terms. Why dispense with that material averment which requires proof as laid, and retain this immaterial one which need not be proved as laid.

But if it is necessary to charge that an offense was committed before the finding of the bill, then the bill

speaks from the time of its being found. If it avers that a thing was then done, then it does allege, "generally," that it was done before the finding. To say that the defendant did feloniously steal, is not an averment that he is now stealing, that he "*stole*" to-morrow, but heretofore; that is, that before the finding of this bill, in which this allegation is contained, he did steal.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff in error was convicted, by a jury, in the Circuit Court of Haywood county, of larceny, and sentenced to the penitentiary for the term of five years, and judgment was pronounced accordingly.

The only error insisted upon is, that the court below should have quashed the indictment upon the motion of defendant, or have arrested the judgment.

The objection taken is, that no time is specified in the indictment, at which the offense was committed. The only allegation of the time of the commission of the offense is, "on the —— day of ——, 1870."

We do not consider this a sufficient allegation according to the rules of the common law; nor is it in compliance with section 5124 of the Code, which materially modified the law as previously recognized in this State.

We are of opinion that, by section 5124 of the Code, it was intended to declare that it was not necessary to state the true date at which an offense was committed, when time was not a material ingredient in the offense, but that it was necessary to state some day

before the finding of the indictment, or that the indictment should allege that the offense was committed before the finding thereof.

So that no change is made by this section in the law as it has always existed in Tennessee, except the one, of very questionable propriety, allowing the general allegation that the offense was committed "before the finding of the indictment," to be substituted for the allegation that it was committed on a particular day.

It is not an insensible or irrational requirement of the common law, that a day certain, should be alleged in the indictment as the time of the perpetration of the offense.

If it be conceded that it is illusory so far as it purports to notify the defendant of the real time of the commission of the offense, it is nevertheless of practical utility in giving him an opportunity, by motion, to quash, or by demurrer,[1] to free himself from vexatious litigation and the State from needless costs, whenever, from the time stated on the face of the indictment, of the commission of the offense, it appears that the prosecution is barred by the statute of limitations.

It is argued by the Attorney General, that it must be necessarily inferred, from the terms of the indictment, when it charges that defendant "did feloniously steal, take and carry away a certain bale of lint cotton," &c., that the felony was committed before the finding

[1] But this point is decided otherwise: *State* v. *Bowling*, 10 Hum., 52.

thereof, that the language clearly implies that the act charged was done before the indictment was found.[1]

This is certainly a correct grammatical construction of the language employed in the indictment.

But we can not see that this construction relieves the difficulty.

In effect and meaning, the statute says you may dispense with the allegation that the offense was committed on a particular day, by alleging that the offense was committed before the finding of the indictment.

And we hold, that, in such case, it must be alleged in the indictment, as a substantive fact, that the offense was committed before the finding thereof, and not be left to be inferred from other independent facts charged, or reasoned out by construction.

It is surely no more difficult to follow forms or rules sanctioned by long usage, and approved by the experience of eminent jurists, than to devise new ones in their stead, and this we have no authority to do.

While improvements upon the rules of practice, and upon the law itself, should not be rejected simply because they are innovations; on the other hand, innovations upon established systems ought to be adopted cautiously, and only when they are manifestly improvements.

It is very easy for a District Attorney, with reason-

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[1] This does not accurately state the Attorney General's position. It was, that an allegation in the indictment, that the defendant "did," was an express averment that it was done before the time of the indictment, and not a mere inference. If he "did it," he did it before that time--not in the future, but in the past.

able attention to his duties, to frame his indictments correctly.

If, however, from inattention or other cause, he fails to allege in his indictment or presentment, a specific day on which the offense was committed, and also fails to specifically allege that the offense "was committed before the finding of the indictment," the indictment can not be sustained by construction, inference or intendment, but must be held bad at common law and under our State law.

It follows, that the court below erred in refusing to quash the indictment. The motion to quash, in our practice, being a substitute for demurrer,[1] the judgment must therefore be arrested, and the prisoner must be remanded to the Circuit Court of Haywood county, to be held to answer the charges against him, upon a sufficient indictment.

The State will pay the costs of this prosecution, which have accrued on behalf of the State.

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[1] It is held otherwise in *Jones* v. *State*, 6 Hum., 435, 437; and in *State* v. *Willis*, 3 Head., 157. See also *Jetton* v. *State*, Meigs, 192, and *Henslie* v. *State*, *post*; also, *State* v *Jones*, 5 Ala., 666.

Buchanan Fowler *v.* The State.

BUCHANAN FOWLER *v.* THE STATE.

INDICTMENT. *Joinder of offenders and offenses.* An indictment against two persons for assault and battery upon three persons, is good.

FROM HENRY.

Appeal from the Circuit Court, January Term, 1871. J. D. PORTER, J., presiding.

W. D. LANNUM, for plaintiff in error.

Attorney General HEISKELL, for the State.

NELSON, J., delivered the opinion of the Court.

The indictment in this case, charges two persons with committing an assault and battery upon three, and it is insisted that the Circuit Court erred in refusing to quash it upon motion, because three offenses are thereby embraced in one count. It is neither a legal nor physical impossibility that two persons, by one and the same act, could commit the same identical offense. Mr. Russell says: "It was formerly holden that a person could not be prosecuted on one indictment for assaulting two persons, each assault being a distinct offense. But the case has subsequently been treated as one which was not well considered; and the court said: 'Can not the king call a man to account for a breach of the peace, because he

The State *v.* Stephen Irvine.

broke two heads instead of one?'" 1 Russ. on Crimes, 5th Am. ed., 759. So, "It has been said that a person could not be indicted for assault on two distinct parties in the same indictment; but this doctrine is now exploded." 2 Chit. Cr. Law, Riley's ed., 582, in note citing 2 Ld. Raym., 1572; 2 Burr., 984. See, also, 1 Waterman's Archb. Cr. Pr., 314, 315.

Affirm the judgment.

THE STATE *v.* STEPHEN IRVINE.

1. PRESENTMENT. *Selling liquor at Elections. Duplicity.* An indictment or presentment is not double, which charges that the defendant "did, on election day, sell, give, vend and retail, spirituous, vinous and fermented liquors, to T. W.,[1] near the election ground."[2]
2. SAME. *Same.* Such presentment is good, without charging that an election was held. The charge that it was on election day sufficiently charges that the election was held.

FROM MADISON.

Circuit Court, W. P. BOND, J., presiding. October Term, 1870.

Attorney General HEISKELL, for the State.

CARUTHERS & MALLORY, for defendant, insisted that the indictment was bad for duplicity, "give" importing

[1] See *State* v. *Ailey, ante*, 8. [2] What is near? See *Man's* v. *State, post*, —.

a different offense from "sell, vend and retail," citing 1 Whart. Cr. L., 382, and cases cited, especially *Miller* v. *State*, 5 How. Miss., 250; Arch. Cr. Pl., 49; *Whiteside* v. *State*, 4 Cold., 175. That the presentment ought to allege that an election was held on that day. The presentment follows the statute; but that is insufficient: *Bradford* v. *State*, 3 Hum., 370; *State* v. *Ladd*, 2 Swan, 226; *Harrison* v. *State*, 2 Cold., 232; *Pearce* v. *State*, 1 Sneed, 63. Offense must be charged with certainty: 1 Ch. Cr. L., 228.

DEADERICK, J., delivered the opiuion of the Court.

The presentment in this case was quashed in the Circuit Court of Madison county. It charges "that one Stephen Irvine, late of said county, grocer, on the 26th day of March, 1870, on election day, with force and arms, in the county aforesaid, did then and there, willfully and unlawfully, sell, give, vend and retail, spirituous, vinous and fermented liquors, to one Theodorick Webb, near the election ground, in the City of Jackson," &c.

The objections taken to the presentment are:

1. That it is bad, because it charges at least two distinct offenses in the same count.

2. That it does not aver that any election was held upon "election day."

The statute provides, "that no liquor shop in this State shall be kept open on election days, nor shall any person, on said days, give or sell intoxicating liquors to any person, at or near an election ground:" Acts of 1869–70, p. 24.

The object of the law is, to prevent the use of liquor upon "election day; and if given or sold on that day, at or near the election ground, that object would be defeated.

In the case of *The State* v. *Jopling*, 10 Hum., 419, where the presentment charged in a single count, that the overseer neglected to mile mark, and put up pointers at the forks of the road, the Court say: "We see no reason why there should be two presentments [counts] in such a case."

The presentment was quashed below, and upon appeal in error to this Court, the judgment was reversed, and the cause remanded for further proceedings.

The reasons assigned in that case, why both offenses might be charged in the same count, were, that the duties were prescribed by the same Act; were of the same character; and failure to perform them was punishable by the same penalty.

The case in 4 Hum., 25, is not in conflict with the principles settled in this case; but the reason, in that case, why the two cases could not be joined together in the same count, was, that the punishment provided by the statute was different—in the one case being limited to $5, and in the other to $50.

The offenses of selling and giving away liquor, are created by the act of December 9, 1869, and are of the same character, and punishable alike, and both offenses tend to produce the same evils, which it is the object of the statute to prevent.

On the other hand, it has been held by this Court, in a case of felony, that where two distinct offenses

were charged in the alternative, in the same count, the indictment was bad: 4 Cold., 183.

It may be regarded as the settled law in felony cases, that there may be a joinder, of distinct offenses when they are of the same nature, and admit of the same plea and judgment, as well as of several offenders in the same indictment; but each distinct offense should be charged in a separate count: 9 Yer., 333; 1 Cold., 175.

Following the case in 10 Hum., we hold that in misdemeanors, when two offenses of the same character are created by the same statute, and are punishable in the same manner, that they may be joined in the same count of an indictment or presentment.

The other objection is, that the presentment does not aver that any election was held upon that day upon which it is charged the offense was committed.

The charge in the presentment, is in the words of the statute creating the offenses; and we are of opinion that the averment that the defendant sold, &c., on election day, near the election ground, &c., necessarily imports that an election was on that day held, upon the election ground.

It follows that the action of the Court below, in quashing the presentment, was erroneous.

Let the judgment be reversed, and the cause remanded for further proceedings.

John Ligan *v.* The State.

JOHN LIGAN *v.* THE STATE.

1. CONSTITUTIONAL LAW. *Appointment of Judges by the Bar.* The Act of 1870, c. 78, s. 1, authorizing the selection of a Judge by the members of the Bar, in certain cases, is not unconstitutional, but valid.[1]

2. SAME. *Cruel and unusual punishments.* Fine and imprisonment in the county jail, or in the Penitentiary, are not cruel and unusual punishments, within the meaning of the Constitution, Art. 1, s. 16.

FROM CARROLL.

In the Circuit Court, May Term, 1871, ISAAC R. HAWKINS, Special J., presiding. The defendant was convicted for feloniously prowling and travelling in disguise, &c.

A. G. HAWKINS, for the prisoner, among other points, insisted that the Act of 1870, c. 78, s. 1, Sess. A., p. 125, is unconstitutional. That the Const., Art. 6, s. 11, provides for an *appointment*, the Act of 1870 for an *election*, in which the privilege of the ballot is restricted to a favored few, a departure from the principle of universal suffrage embodied in the Constitution. That Judges must be commissioned.

Attorney General HEISKELL, for the State, insisted: That the Constitution is to be construed in view of the evil to be remedied. Judges were often absent from court, and time was lost. Mr. Gardner, of the Convention, reported to that body that the plan of selecting Judges by the Bar had been tried in Kentucky and

[1]See *Hundhausen* v. *T. F. & M. Ins. Co.* Jackson, June 28, 1871 S. P.

found to work well, and proposed a clause embodying the plan in the Constitution. The Judiciary Committee thought it was better to leave the matter to the Legislature. They reported the change in Section 11, and made it declare that "the Legislature should have power to make provision by general laws for the appointment of Special Judges to hold any court, the judge of which shall be *unable* or *fail* to *attend* or *sit*, or to hear any cause in which the judge may be incompetent."

The Constitution of 1834 made provision for sickness alone, not for incompetency or mere failure to *attend* or *sit*. This act provides for incompetency and failure to *attend* or mere failure to *sit*, when in attendance. These words were studied, and have meaning. In the Old Constitution, no sudden emergency was provided for. Sickness, when it became chronic, or occurred before a court, could be provided for by application to the Governor. But a failure to *attend* or *sit* could only be met by ready and prompt means. It will not do to attribute an intention to the Convention to provide for the failure of a judge to sit at a court, by means which, in a majority of cases, could only be brought into operation after the court had ended. But the section provides for a commission by the Governor in cases of vacancy in the Supreme Court. Why was this provision not extended to all courts? The Convention did not leave the matter doubtful as to Supreme Judges. If they intended that the same law should apply to others, why discriminate? They confer the power on the Legislature without limit.

The case of *Brogan* v. *Savage*, 5 Sneed, 689, puts

that case on the ground of consent of parties, making the person chosen an arbitrator, not a judge. That was under a Constitution that gave no power to provide for incompetency. This act was passed by a Legislature in session while the Convention was. It is an act of contemporaneous construction. The act has been practiced upon; universally accepted as valid. It is an *appointment* by lawyers, competent to judge, capable to make the selection, and impartial.

FREEMAN, J., delivered the opinion of the Court.

After disposing of several questions, he said: The question whether the judge who tried this case was authorized to act as such, is presented for decision, and as there have been a number of such appointments as this, by an election by members of the Bar, and doubt is entertained as to the validity of such elections or appointments, it is proper to examine the provisions of the Constitution on this subject, and construe them, that the question may be settled.

It appears from the record in this case, that, on the first day of the term, Hon. James D. Porter, the judge of the circuit, being absent, the clerk of the court, after having ascertained the sense of the Bar present, in pursuance of an Act of the Legislature, entitled "An Act to provide for the appointment of Special Judges in certain cases, passed July 7th, 1870," proceeded to hold an election for a judge to preside and adjudicate cases until the arrival of the regular judge of said judicial circuit. At this election by members of the Bar, Hon. Isaac R. Hawkins was chosen Special Judge, took

the oath of office as prescribed in said act, and entered upon the duties of the office. The trial of the prisoner was had before him, without objection made to his competency or his right to hold said court.

It is now insisted, however, as the facts are shown in the record, that this election was unauthorized by the Constitution, and the trial and conviction are nullities, not being by a court or under the direction of a judge of the State of Tennessee.

The question of the constitutionality of this act of the Legislature is not free from difficulty by any means.

The act of the Legislature authorizes an election by members of the Bar in cases where the "Judges of any court of record (other than the Supreme Court) fail to attend, or, if in attendance, can not properly preside in a cause or causes pending in such court."

The clause of the Constitution under which this Act of the Legislature was passed, is Section 11 of Art. 6, and provides: "No Judge of the Supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity, or affinity, within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any inferior court, except by consent of parties. In case all or any of the Judges of the Supreme Court shall be disqualified from presiding in the trial of any cause or causes, the Court, or the Judges thereof, shall certify the same to the Governor of the State, who shall forthwith commission the requisite number of men of law knowledge for the

trial and determination thereof." It then provides: "The Legislature may, by general laws, make provision that special judges may be appointed to hold any court, the judge of which shall be unable or fail to attend or sit; or hear any cause in which the judge may be incompetent."

It will be seen, that in case of the judges of the Supreme Court, the Constitution itself provides for the Governor's commissioning men to try and determine the cases in which they are incompetent. But in case of a judge of an inferior court, the Legislature is left to make provision that special judges may be appointed to hold any court. It is not a provision for filling a vacancy, but goes upon the assumption that the office itself is filled by the regular incumbent, who fails to attend and sit, or is incompetent to try any cause on the docket.

After looking carefully into the various provisions of the Constitution bearing on the question, we conclude that the Constitution did not intend to authorize the filling of an office, but only to allow the Legislature to provide for the temporary appointment of some one to "hold any court" when the judge failed to attend and sit, or was incompetent; and that the mode of such appointment is within the discretion of the Legislature. We can see no objection to making this appointment by the members of the Bar. It no more contravenes the "principle" of universal suffrage and election of all officers by the people, as insisted by counsel, than would an act of the Legislature which

should provide for the appointment of a person to hold the court, by the Governor.

The members of the Bar are interested in selecting the best man for the place, and certainly are better qualified to judge of the fitness of the party who may be selected by them, than the Governor of the State, who may know nothing on the subject.

We hold, therefore, there is nothing in this objection.

It is urged that the penalties imposed by this Act of Legislature, under which defendant stands indicted, are obnoxious to the charge of violating the Bill of Rights, 16th Section, Article 1st, of the Constitution, providing that "cruel and unusual punishments shall not be inflicted." We may say, the punishment here is neither cruel nor unusual. "Fine and imprisonment in the county jail" for the misdemeanor, and for the felony, in the second Section, "imprisonment in the penitentiary for a long period, ten to twenty years," but this is neither cruel nor unusual, in the sense of the Constitution. When we look at the evils intended to be checked, and offenses forbidden by this act, and turn to the proof in this case, and see the character of acts shown to have been committed by some one, we feel no hesitancy in saying, that whenever parties shall be regularly convicted after a fair and impartial trial, in accordance with the forms of law, of such offenses, we shall feel no hesitancy in enforcing sternly the penalties provided by the statute.

Every home in this State is entitled to be protected from intrusion and outrage, whether it be the man-

sion of the wealthy or the hovel of the poorest man in the land.

It should be the pride and boast of every citizen to make the law so effective in its protective power, that we may be able to say of our country, as Canning said of the peasant homes of England, "that the winds and rains may enter them, but, without the warrant of the law, the King dare not do it." We can only attain this desirable end by punishing promptly and severely all who shall dare, in violation of law, to intrude upon the sanctities of that place in which no forbidden or uninvited foot should ever be permitted to tread.

NOTE.—The case was reversed on other points.

[REPORTER.

JAMES ANDREWS *v.* THE STATE, THE STATE *v.* FRANK O'TOOLE, AND THE STATE *v.* ELBERT CUSTER.

1. CARRYING ARMS. *Constitution.* The Act of 1870, c. 13, to prohibit the carrying of deadly weapons, is constitutional.
2. CONSTITUTIONAL LAW. *Constitution of U. S. Amendments not restrictions on States.* The Constitution of the United States, Art. 2, of Amendments, declaring the right of the citizen to bear arms, is a restriction alone upon the United States, and has no application to the State Governments.
3. SAME. *Right to bear arms. Common defense.* The right to bear arms for the common defense does not mean the right to bear them ordina-

rily or commonly, for individual defense, but has reference to the right to bear arms for the defense of the community against invasion or oppression.

4. SAME. *Same. Right to keep and use.* The citizen has, at all times, the right to keep the arms of modern warfare, and to use them in such manner as they may be capable of being used, without annoyance and hurt to others, in order that he may be trained and efficient in their use.

5. SAME. *Same. Same. Regulations of. Arms of warfare.* The right to keep arms of warfare can not be prohibited by the Legislature under the permissive clause of the Constitution of 1870, allowing the Legislature to *regulate* the "*wearing*" of arms. The use of such arms may be restricted as to manner, time or place, due regard being had to the right to keep and bear, for the constitutional purpose, but can not be prohibited.

6. SAME. *Right to prohibit other arms.* The right to keep or bear other arms, not being protected by the Constitution, may be absolutely prohibited.

FROM GIBSON, CARROLL AND HENRY.

The case of *The State* v. *Andrews*, was tried in the Circuit Court of Gibson county, at February Term, 1871, before GID. B. BLACK, J., and upon a conviction, defendant appealed.

O'Toole was indicted in the Circuit Court of Carroll, where, at May Term, 1871, he moved to quash before JAMES D. PORTER, J., on the ground that the Act of 1870, c. 13, was unconstitutional, and because the indictment did not charge that the pistol was a belt pistol, or pocket pistol. The indictment being quashed on both grounds, the District Attorney, J. D. DUNLAP, appealed to this Court.

Custer was indicted in the Circuit Court for Henry county, at September Term, 1870; and at January Term, 1871, J. D. PORTER, J., presiding, defendant submitted,

was fined, and ordered to be imprisoned. Thereupon, the District Attorney, DUNLAP, moved that he be required to give sureties to keep the peace, which being refused, he appealed for the State.

ALVIN HAWKINS, for Andrews and O'Toole, insisted that, by Article 2 of the amendments to the Constitution of the United States, the right to bear arms was protected. Also by Art. 1, s. 26, of the Constitution of 1834. He relied on *Aymette* v. *The State*, 2 Hum., 154; cited the Constitution of 1870, Art. 1, s. 26; insisted that the power to regulate did not involve the power to prohibit, and that this act was a prohibition. That in Aymette's case the arms carried were not arms of warfare, the wearing of which the Legislature had the power to prohibit; that this is the only point decided in that case—all else is *dictum*. He insisted that the words relied upon by Judge Green as restrictive, *i. e.*, "for the common defense," could not be of any effect, as the right was guaranteed without any such restriction in the Constitution of the United States; that the necessity was not only to keep them at all times, but to be inured to their use by constantly bearing them about with them; that the power in the Constitution of 1870 to regulate the *wearing* of arms, implies a right to wear as well as to bear arms, and that this right was subject only to be regulated, not destroyed.

J. N. THOMASON, for Custer, insisted that the indictment was bad, for not showing what sort of pistol was carried. He insisted upon the protection of the Constitution of the United States, and of the State, and that

the Legislature had no power over the arms of civilized warfare, but might prohibit the carrying of other arms.

Attorney General HEISKELL, for the State, insisted that Article 2, of the amendments to the Constitution of the United States had no application to States; that it was an imputation on the statesmanship of any convention to suppose that they meant to put a constitutional limitation on the power of the people to restrict the privilege (curse) of carrying deadly weapons. Aymett's case negatives this construction, and puts on it a meaning worthy of statesmen, protecting rights of freemen, not of ruffians and cut-throats. To attribute to the Convention of 1870, such an intention, in view of the state of things then existing, would be to impute to them utter incapacity. The Constitution of 1870 contains an express power to regulate the wearing of arms, not to *regulate* the *mode*, but the thing, the subject; equivalent to adopt *rules concerning*, to *pass laws relative to*. To regulate is not necessarily to permit. Regulations are simply rules. Rules concerning a thing may be mandatory, directory, restrictive or prohibitory—affecting the mode or going to the substance. If they can not prohibit carrying arms, they may, by regulation, determine what arms may be carried, what shall be proscribed; may declare where they may be carried, and when they may be carried, as well as declare the mode. If weapons of warfare are protected by the Constitution, still they are subject, by the exception, to regulation in respect to times, places and modes. In this act they restrict the time to journeys out of the county, but do not restrict the mode.

The legislative power is the power of the whole people, acting by their representatives. If they choose in that mode, to declare their willingness to part with a portion of their own liberty, in order that by the same law the evil minded may be restrained, who shall say nay? In the exercise of this great power by the people, they are not to be held to have tied their own hands, except where the Constitution makes it clear that they so intended.

The protection of minorities is one object of *constitutional* provisions. The protection of majorities is committed to the *Legislature.* They may protect themselves from the diabolical minorities by any act to which they are willing to submit themselves. The courts will not strain the Constitution to restrain legislation, but in a doubtful case will defer to the legislative judgment.

In the case of *Aymette* v. *The State,* Judge Green takes a proper view of the Constitution. In Alabama, about the same time, the same view was taken in the case of *The State* v. *Reid,* 1 Ala., 612. In each the Constitution is treated as an instrument worthy of statesmen, and construed in the light of History; but in both there are points which will not bear critical examination. These cases strike out the true principle that it is the *bearing* of arms, not for private broils and purposes of blood, but in defense of a common cause; as citizen soldiers *bearing* arms for their defense, in common with each other; not commonly; *i. e.,* on ordinary occasions. They looked to history for the occasions when the people met, bearing arms for the common defense; when they extorted from King John the great charter; when they vanquished Charles I; when they dethroned James II. They re-

fer to the laws to restrict carrying arms in certain places, and to certain persons, which gave rise to no complaint, remonstrance or repeal; they refer to laws by which communities and classes were disarmed by discriminating regulations; and such laws were declared against, but in the very declaration, the right to legislate on the subject, is recognized. It was this great political right that our fathers aimed to protect; not the claims of the assassin and the cut-throat to carry the implements of his trade. They would as soon have protected the burglar's jimmy and skeleton key.

The keeping of arms is protected, but that right is not infringed by this law. The citizen may keep arms in his house, may carry them about his own premises, may buy and carry them home, may take them to have them repaired. This is not *carrying* them in the sense of the statute. Of a porter carrying a box of pistols in his wheelbarrow or on his shoulder, we would not say he carries arms; of a man carrying the separated parts of a pistol in a basket or bundle, we would not say he carries a pistol. The statute is to have a reasonable construction. "Carry arms" is a military command. To carry arms, or to bear arms, is something different from merely supporting the weight, or removing from place to place.

The clause in the Constitution of 1870 was introduced to avoid controversy over the adverse views in the cases of Simpson and of Aymette, not to imply anything.

FREEMAN, J., delivered the opinion of the Court.

The questions presented for our decision in these cases, involve an adjudication of the constitutionality of

the act of the Legislature of Tennessee, passed June 11, 1870, entitled "An act to preserve the peace and prevent homicide."

The first section provides, "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver. Any person guilty of a violation of this section shall be subject to presentment or indictment, and on conviction, shall pay a fine of not less than ten, nor more than fifty dollars, and be imprisoned at the discretion of the court, for a period of not less than thirty days, nor more than six months; and shall give bond in a sum not exceeding one thousand dollars, to keep the peace for the next six months after such conviction."

The second section imposes upon all the peace officers of the State the duty of seeing this act enforced. The third section makes certain exceptions in favor of officers and policemen, while *bona fide* engaged in their official duties in execution of process, or while searching for, or engaged in arrest of criminals, and in favor of persons *bona fide* assisting officers of the law, and persons on a journey out of their county or State.

These are the leading provisions of this statute, and present the points of attack made upon it in argument at the bar.

It is first insisted, that it is in violation of, and repugnant to the second article of the Amendments to the Constitution of the United States, which is, that "a well regulated militia being necessary to the security of a free state, the right of the people to *keep* and *bear* arms shall not be infringed.

On the other hand, it is maintained by the Attorney General, that these amendments have no application to the States, and spend their force by limiting the powers of the Federal Government; and are, in their nature, simple restraints imposed by the States upon the government created by them, and therefore we can not look to this article in order to test the validity of the acts in question. Upon the face of this article, it might have been plausibly insisted that it would have been operative upon, and control the action of the State, as well as of the Federal Government; and this position would apparently be strengthened by the other provision of the Constitution of the United States, Art. 6, s. 2., that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. It will be seen, however, that it is the "Constitution, and laws made in pursuance thereof," that are the supreme law of the land, so that we are to turn to that instrument, and ascertain what, by its fair construction and exposition, was intended to be allowed or prohibited, and to what powers its limitations and restrictions were applicable.

With this view, we examine the question in reference to the proper application of the article of the amendment under consideration.

The case of *Barron* v. *The Mayor and City Council of the City of Baltimore*, 7 Pet., 465, Curtis' ed., presented the question of the taking of private property, by the cor-

poration of the city, as it was assumed for public use. It was insisted, in favor of the jurisdiction of the Supreme Court of the United States, to review the decision of the State court, that the case was within and arose under the provision of the Constitutional amendments, Art. 5, prohibiting the taking of private property for public use, without just compensation. That this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. The question was discussed with his usual ability, by Chief Justice Marshall, and he lays down the proposition: "That the Constitution was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States formed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, necessarily applicable to the government created by the instrument. They are limitations of the power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." The learned Judge, after arguing the question at some length, says: "If in every inhibition intended to act on State power,

in the original Constitution, words are employed to express that intent; some strong reason must be shown for departing from this safe and judicious course in framing the amendments, before that departure can be assumed." He then goes on to demonstrate that no such reason existed. He says: "Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been called by the discontented State, and the required improvements would have been made by itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention."

The Court, therefore, held that the provision of the 5th amendment, declaring that private property shall not be taken for public use without just compensation, was intended solely as a limitation on the power of the Government of the United States, and was not applicable to legislation of the States. See, also, 5 Wal., 479-80, and numerous other cases decided by the Supreme Court of the United States, cited in note to case of *Barron* v. *City of Baltimore*, Curtis' ed., 468.

We need cite no authority to sustain the proposition that, upon a question involving the construction of the Constitution of the United States, or the just power of that government under said Constitution, the

decisions of the United States are binding on this Court, as well as all other courts of the States.

The State Legislature is not, then, limited in its powers on this subject by this article of the Constitution of the United States; it is a limitation, whatever be its construction and meaning, upon the powers of the other government, ordained and established by the people of the States themselves, or their Conventions or Legislatures.

We come now to the Constitution of the State of Tennessee, and endeavor to see what restrictions or limitations the sovereign people of Tennessee have chosen to place upon themselves, in reference to this subject, for the general good.

First, it may be assumed as almost an axiom in our law, with reference to the Legislatures, or law-making body of the States, that there is no limitation upon their powers, except such as are found either in the Constitution of the United States, or of the State itself. Plenary power in the Legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power, is an exception: Cooley, Const. Lim., 88, 89; *People* v. *Draper*, 15 N. Y., 543.

We do not, however, hold the power of the Legislature to be supreme for all purposes, when not in terms prohibited by one or the other of these Constitutions. We find limitations upon the powers of State Legislatures, as clearly defined by fair construction and implication, and as binding, as if expressed in so many words.

The division or separation of the powers of government in our States, between the three departments,

legislative, judicial and executive, involves restraint upon the action of the Legislature, that is imperative, and may be fairly arrived at with sufficient certainty by the application of the principle that it is the Legislature that is the law-making power. The well-settled common law definition of a law is, a rule of *action* prescribed by the law-making power. It must, then, of necessity, (subject to possible exceptions,) be an enactment operative in the future, in so far as it is to be a rule of action prescribed for the people of the State. No enactment of a Legislature can, in the nature of things, reach back, and control or give direction to an act already accomplished. It was complete from the moment of its birth, so to speak, and can not be influenced or affected by another act, subsequent in time.

This view, however, is only incidentally mentioned, as presenting a ground of limitation on the powers of State Legislatures.

The Constitution of Tennessee, of 1834, Art. 1, s. 24, of the Bill of Rights, is: "That the sure and certain defense of a free people is a well-regulated militia; and as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that, in all cases, the military shall be kept in strict subordination to the civil authority." Section 25 exempts citizens, except such as are in the army of the United States, or militia in actual service, from punishment by martial law. Then follows section 26, which provides "that the free white men of this State have a right to *keep* and *bear* arms for their common defense."

Section 24, in the Constitution of 1870, is the same as in the Constitution of 1834.

Section 26 is: "That the *citizens* of this State have a *right* to *keep* and bear arms for *their* common defense. But the Legislature shall have power by law, to regulate the wearing of arms, with a view to *prevent* crime."

What is the fair and legitimate meaning of this clause of the Constitution, and what limitations does it impose on the power of the Legislature to regulate this right? is the question for our consideration.

What rights are guaranteed by the first clause of this Art. 26, "that the citizens have a right to keep and to bear arms for their common defense?" We may well look at any other clause of the same Constitution, or of the Constitution of the United States, that will serve to throw any light on the meaning of this clause. The first clause of section 24 says, "that the sure defense of a free people is a well-regulated militia." We then turn to Art. 2, of amendments to the Constitution of the United States, where we find the same principle laid down in this language: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be abridged." We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions; in the one, as we have shown, against infringement by the Federal Legislature, and in the other, by the Legislature of the State. What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of

the land? It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this, they were to be allowed to *keep* arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use, in order to attain to this efficiency. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fullness.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpase, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms, involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in

times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Again, in order to arrive at what is meant by this clause of the State Constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is "arms;" that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted to the ends indicated above; that is, the efficiency of the citizen as a soldier, when called on to make good "the defence of a free people;" and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country.

What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to *keep* such arms, can not be *infringed* or *forbidden* by the Legislature. Their *use*, however, to be subordinated to such regulations and limitations as are or may be authorized by the law

of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right.

What limitations, then, may the Legislature impose on the use of such arms, under the second clause of the 26th section, providing: "But the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime?"

In the case of *Aymette* v. *The State*, 2 Hum., 159, Judge Greene said, that, "the convention, in securing the public political right in question, did not intend to take away from the Legislature all power of regulating the social relations of the citizen upon this subject. It is true, it is somewhat difficult to draw the precise line where legislation must cease, and where the political right begins, but it is *not* difficult to state a case where the right of the Legislature would exist." This was said in reference to the clause of the Constitution of 1834.

The Convention of 1870, knowing that there had been differences of opinion on this question, have conferred on the Legislature in this added clause, the right to regulate the wearing of arms, with a view to prevent crime.

It is insisted by the Attorney General, as we understand his argument,[1] that this clause confers power on the Legislature to prohibit absolutely the wearing of all and every kind of arms, under all circumstances.

[1] It will be seen, by reference to the argument, that the judge has not in this and the following paragraphs, caught its spirit with his wonted accuracy. And see p. 199 in note.

To this we can not give our assent. The power to regulate, does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated. When applied to conduct or the doing of a thing, it must, of necessity, mean some check upon, or direction given to that conduct or course of action, implying the act being performed, but subject to certain limitations or restraints, either as to manner of doing it, or time, or circumstances under which it is or may be done. Adopt the view of the Attorney General, and the Legislature may, if it chooses, arbitrarily prohibit the carrying all manner of arms, and then, there would be no act of the citizen to regulate.

But the power is given to regulate, with a view to prevent crime. The enactment of the Legislature on this subject, must be guided by, and restrained to this end, and bear some well defined relation to the *prevention* of crime, or else it is unauthorized by this clause of the Constitution.

It is insisted, however, by the Attorney General, that, if we hold the Legislature has no power to prohibit the wearing of arms absolutely, and hold that the right secured by the Constitution is a private right, and not a public political one, then the citizen may carry them at all times and under all circumstances. This does not follow by any means, as we think.

While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the

ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.

Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them, nor necessary in order to his familiarity with them, and his training and efficiency in their use. As to arms worn, or which are carried about the person, not being such arms as we have indicated as arms that may be kept and used, the wearing of such arms may be prohibited if the Legislature deems proper, absolutely, at all times, and under all circumstances.

It is insisted by the Attorney General, that the right to keep and bear arms is a political, not a civil right. In this we think he fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.

It is said by the Attorney General, that the Legislature may prohibit the use of arms common in warfare, but not the use of them in warfare; but the idea of the Constitution is, the keeping and use of such arms as are useful either in warfare, or in preparing the citizen for their use in warfare, by training him as a citizen, to their use in times of peace. In reference to the sec-

ond article of the Amendments to the Constitution of the United States, Mr. Story says, vol. 2, s. 1897: "The importance of this article will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden foreign invasion, domestic insurrection, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up a large military establishment and standing armies in times of peace, both from the enormous expense with which they are attended, and the facile means which they afford to ambitious rulers to subvert the government, or trample upon the rights of the people. The right of the citizen to keep and bear arms, has justly been considered as the palladium of the liberties of the republic, since it offers a strong moral check against usurpation and arbitrary power of rulers; and will in general, even if these are successful in the first instance, enable the people to resist and triumph over them."

We cite this passage as throwing light upon what was intended to be guaranteed to the people of the States, against the power of the Federal Legislature, and at the same time, as showing clearly what is the meaning of our own Constitution on this subject, as it is evident the State Constitution was intended to guard the same right, and with the same ends in view. So that, the meaning of the one, will give us an understanding of the purpose of the other.

The passage from Story, shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed

by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.

Mr. Story adds, in this section: "Yet though this truth would seem to be so clear, (the importance of a militia,) it can not be disguised that among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How is it practicable," he asks, "to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt, and thus gradually undermine all the protection intended by this clause of our national bill of rights."

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, "a well regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

As we understand the able opinion of Judge Green, in the case of *Aymette* v. *State,* 2 Hum., 158, he holds the same general views on this question, which are to be found in this opinion. He says: "As the object for which the right to keep and bear arms is secured is of a general nature, to be exercised by the people in a body for their common defense, so the arms—the right to keep which is secured—are such as are usually employed in civilized warfare, and constitute the ordinary military equipment. If the citizens have these arms

in their hands, they are prepared in the best possible manner, to repel any encroachments upon their rights by those in authority."

He says, on p. 159: "The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defense." And we add, that this right to keep arms, though one secured by the Constitution, with such incidents as we have indicated in this opinion, yet it is no more above regulation for the general good than any other right. The right to hold property is secured by the Constitution, and no man can be deprived of his property "but by the judgment of his peers, or the law of the land." If the citizen is possessed of a horse, under the Constitution it is protected and his right guaranteed, but he could not, by virtue of this guaranteed title, claim that he had the right to take his horse into a church to the disturbance of the people; nor into a public assemblage in the streets of a town or city, if the Legislature chose to prohibit the latter and make it a high misdemeanor.

The principle on which all right to regulate the use in public of these articles of property, is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member.

So we may say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish

him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restrictions on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

We may here refer to the cases of *Bliss* v. *Commonwealth*, 2 Littell, Ky., R., 90; *State* v. *Reid*, Alabama R., 612, and case of *Nunn* v. *State of Georgia*, 1 Kelly Rep., 243, as containing much of interesting and able discussion of these questions; in the two last of which the general line of argument found in this opinion is maintained. The Kentucky opinion takes a different view, with which we can not agree. We have not followed precisely either of these cases, but have laid down our own views on the questions presented, aided, however, greatly by the reasoning of these enlightened courts.

We hold, then, that the Act of the Legislature in question, so far as it prohibits the citizen "either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol," is constitutional. As to the pistol designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon

is included in the designation "revolver." We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon—skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand, consistently with the views herein expressed. It will be seen the statute forbids by its terms, the carrying of the weapon publicly or privately, without regard to time or place, or circumstances, and in effect is an absolute prohibition against keeping such a weapon, and not a regulation of the use of it. Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute.[1]

In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them in the ordinary mode of using such arms and is inoperative.

If the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or

[1]See *Page* v. *State*. *Post* 198, in note.

abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to sustained.[1]

The question as to whether a man can defend himself against an indictment for carrying arms forbidden to be carried by law, by showing that he carried them in self-defense, or in anticipation of an attack of a dangerous character upon his person, is one of some little difficulty. The real question in such case, however, is not the right of self-defense, as seems to be supposed, (for that is conceded by our law to its fullest extent,) but the right to use weapons, or select weapons for such defense, which the law forbids him to keep or carry about his person. If this plea could be allowed as to weapons thus forbidden, it would amount to a denial of the right of the Legislature to prohibit the keeping of such weapons; for, if he may lawfully use them in self-defense, he may certainly provide them, and keep them, for such purpose; and thus the plea of right of self-defense will draw with it, necessarily, the right to keep and use everything for such purpose, however pernicious to the general interest or peace or quiet of the community. Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the pre-

[1]See Act of 1871, c. 90.

vention of crime—a great public end—no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense. The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully proscribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end. Mutual sacrifice of individual rights is the bond of all social organizations, and prompt and willing obedience to all laws passed for the general good, is not only the duty, but the highest interest of every man in the land.

The principle we have laid down is sustained by a well established rule of the law of nations in the conduct of war. While the general rule is, that one belligerent may do his enemy all the injury he can, and for such purpose may lawfully kill him, yet the use of poisoned weapons is forbidden by the law of nations, on the ground that higher ends are thereby subserved, and the rights of sovereign belligerent nations even should be made subordinate to these ends: Vattel Law of Nations, top p. 361. So while the right of self-defense is one at all times to be maintained, yet as to the means used to attain this end, they must be subordinated to the higher claims of the general good of the community.

We admit extreme cases may be put, where the rule may work harshly, but this is the result of all general rules; that they may work harshly sometimes in individ-

ual cases. By our system, however, allowing the Attorney General to enter *nolle prosequi*, with the assent of the Court, there is but little danger of the law being enforced in any such cases to the detriment of any one; and if such case should occur, an application to Executive clemency may fairly be assumed as the remedy provided by the Constitution to meet all such exigencies.

In the case of *The State* v. *Andrews*, one of the cases now under investigation, it is stated in bill of exceptions, that a "plea of self-defense" was filed, demurred to, and demurrer overruled. We can not notice the action of the court on this question, as the plea is not set out so that we can see its allegations and judge of their merits

It was proposed, however, to prove, "that there was a set of men in the neighborhood of defendant during the time he had carried his pistol, and before, seeking the life of defendant." This testimony was objected to, and objection sustained by the court. We can not see from this statement that the court erred, as the character of the weapon is nowhere shown; and it may have been such a weapon, as we have held above, to have been properly forbidden to be carried at all. If so, then it was no defense to the indictment.

The proof, however, showed that he had been in the habit of carrying a pistol since the war. In such a case, he could not claim that he was really in peril of life or limb or great bodily harm, so imminent as to present any element of self-defense in justification of his carrying his pistol.

The law of the land gave him ample protection, if he had chosen to seek its aid by authorizing, on proper ap-

plication, the arrest of the parties, and sureties to keep the peace, or confinement in prison, to prevent the threatened injury. No court can assume that the law, in such case, would be powerless to give the needed protection. And we hold, that it is not only the highest duty of all, to submit to the law, and seek its protection, thus doing reverence to its mandates, but that this involves no humiliation, nor element of cowardice. On the contrary, it marks the highest moral courage to do right, notwithstanding passion and pride may urge us to the contrary course. He who subordinates his pride and his passions to the high behests of social duty, has shown himself as possessing the highest attribute of a noble manhood, sacrifice of self and pride, for the public good, in obedience to law.

In this view of the case, the question of what circumstances will justify a party in carrying arms, such as the Constitution permits him to keep, in legitimate self-defense, is hardly fairly before us. We may say, that the clause of the Constitution authorizing the Legislature to regulate the wearing of arms with a view to prevent crime, could scarcely be construed to authorize the Legislature to prohibit such wearing, where it was clearly shown they were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm, circumstances essential to make out a case of self-defense. It might well be maintained they were not worn under such circumstances in order to crime, or that such purpose existed, or that the wearing under the circumstances indicated, of a weapon that might lawfully be kept, had any direct tendency to pro-

duce crime. On the contrary, the purpose would be to prevent the commission of crime on the part of another.

If the party is protected in the keeping and use of such arms as we have indicated, only to be restrained by such regulations as may be enacted by the Legislature, with a view to prevent crime, it would seem that the use of such a weapon for defense of the person when in actual peril, the end being a lawful one, ought not, upon any sound principle, to subject a party to punishment. However, when the Legislature shall enact a law regulating the wearing of weapons constitutionally allowed to be kept and used, as held in this opinion, the question may be presented fairly, and can be decided.

There was a motion to quash the indictment in each one of these cases, which was overruled. The indictment in each case only charges that the parties carried a pistol, without specifying the character of the weapon, whether belt or pocket pistol, or revolver. This was too indefinite a charge on such a statute, however literally it might be construed. There should be such specifications in the indictment as will enable the court to see that the weapon forbidden by the statute has been worn, and to inform the defendant of the character of weapon for the carrying of which he is to be held to answer.

For this error the cases will be reversed; the indictments quashed, and remanded to the Circuit Courts to be further proceeded in.

NICHOLSON, C. J., and DEADERICK, J., concurred in

the general views of the opinion. SNEED, J., dissented from so much of the opinion as questioned the right of the Legislature to prohibit the wearing of arms of any description, or sought to limit the operation of the act of 1870.

NELSON, J., delivered the following opinion:

Concurring, as I do, in much of the reasoning of the majority of the Court, and believing that the object of the Legislature, in passing the act of 1870, was to promote the public peace, I am, nevertheless, constrained by a sense of duty to observe, that, in my opinion, that statute is in violation of one of the most sacred rights known to the Constitution. Ever since the opinions were promulgated, it has been my deliberate conviction that the exposition of the Constitution by Judge Robert Whyte, in *Simpson* v. *The State*, 5 Yerg., 360, was much more correct than that of Judge Green in *Aymette* v. *The State*, 2 Hum., 155. The expression in the case last named, that the citizens do not need, for the purpose of repelling encroachments upon their rights, "the use of those weapons which are usually employed in private broils, and are efficient only in the hands of the robber and assassin," is, in my view, an unwarrantable aspersion upon the conduct of many honorable men who were well justified in using them in self-defense. *Ibid*, 158. The provision contained in the declaration of rights in the Constitution of 1834, that "that the free white men of this State have a right to keep and bear arms for their common defense," is not restricted to *public* defense, as held in *Aymette* v. *The State*, 2 Hum., 158.

Had such been the intention, the definite article "the," would have been employed, instead of the personal pronoun "their," which is used in a personal sense, and was intended to convey the idea of a right belonging equally to more than one, general in its nature, and universally applicable to all the citizens. The word "bear" was not used alone in the military sense of carrying arms, but in the popular sense of wearing them in war or in peace. The word "arms," means "instruments or weapons of offense or defense," and is not restricted, by any means, to public warfare.

The declaration of rights, section 26, in the Constitution of 1870, omits the words "free white men," and contains an additional provision, which should be construed in connection with the previous decisions of this court, the conflict in which was well known to the framers of that instrument. After declaring "that the citizens of this State have a right to keep and to bear arms for their common defense," it is added: "But the Legislature shall have power, by law, to regulate the *wearing* of arms with a view to prevent crime." The word "bear" was manifestly employed in the Constitution of 1870, to convey the idea of carrying arms either for public or private defense; otherwise, it was unnecessary to add the provision that the Legislature shall have power "to regulate the *wearing* of arms with the view to prevent crime." The habit, or custom, intended to be regulated, was not that of bearing arms fit only to be used in war, and which, from the publicity with which such arms are carried, needed but little, if any, regulation. It was well known to the Convention, that

a very large number of citizens had become accustomed, during the late civil war, to carry pistols and other weapons not ordinarily used in warfare, and had retained this habit after the close of the war, and that dangerous wounds, as well as frequent homicides, were the result of its universal prevalence; and the object of conferring express power to regulate the mode of wearing them, was not to destroy the right, but so to control it that the Legislature, by declaring that such arms should be worn publicly and not secretly upon the person, might prevent those crimes which are often committed by armed men in taking the lives of their unarmed adversaries. To "regulate" does not mean to destroy, but "to adjust by rule," "to put in good order," to produce uniformity of motion or of action; and, under this provision, there can be no question that, while the Legislature has no power to prohibit the wearing of arms, it has the right to declare that, if worn upon the person, they shall be worn in a public manner. The act of 1870, instead of regulating, *prohibits* the wearing of arms, and is, therefore, in my opinion, unconstitutional and void.

In *Bliss* v. *Commonwealth*, 2 Lit., 90, the statute to prevent persons wearing concealed arms, was held unconstitutional, as infringing the right of the people to bear arms in defense of themselves and the State. See Cooley Const. Lim., 350; *Cockram* v. *The State*, 24 Texas, 401. The words "in defense of themselves and the State," are equivalent to the words "for their common defense," and but for the power to regulate, ingrafted upon the Constitution of 1870, should be interpreted here as they

were in Kentucky: "The words '*rules and regulations*,' in the Constitution of the United States, are usually employed in the Constitution in speaking of some particular specified power, which it means to confer on the government, and not, as we have seen, when granting general powers of legislation: as, to make rules for the government and regulation of the land and naval forces; to '*regulate*' commerce; to establish an uniform rule of naturalization; to coin money and '*regulate*' the value thereof. In all these, as in respect to the Territories, the words are used in a restricted sense:" Paschal's Anno. Const., 238; *Scott* v. *Sandford*, 19 How., 337; 2 Story's Const., 3d ed., 196, 213.

Neither the old nor the new Constitution confers the right to keep, or to bear, or to wear arms, for the purpose of aggression. The right exists only for the purpose of defense; and this is a right which no constitutional provision or legislative enactment can destroy. The right to the enjoyment of life is one of the "inalienable rights" with which the Declaration of Independence declares that all men are endowed by their Creator. And one of the most classical and elegant of all legal commentators declared, in regard to the great right of self-defense, that the law, in this case, respects the passions of the human mind, and (when external violence is offered to a man himself, or to those to whom he bears a near connection,) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of the law is by no means an adequate remedy for injuries accompanied with

force, since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man, immediately, to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society:" 3 Black. Com., 34, m. In accordance with this view, I hold that when a man is really and truly endangered by a lawless assault, and the fierceness of the attack is such as to require immediate resistance in order to save his own life, he may defend himself with *any weapon whatever*, whether seized in the heat of the conflict, or carried for the purpose of self-defense. He is not bound to humiliate or, perchance, to perjure himself, in the slow and often ineffectual process of "swearing the peace," or to encourage the onslaught of his adversary by an acknowledgment of timidity or cowardice. It is deeply to be regretted that any peaceful citizen should be placed in a condition making it necessary for him to carry arms for his own protection, and that a purpose, laudable and honorable in itself, is often perverted by "lewd fellows of the baser sort" to purposes of assassination or revenge. But some of the most important elements in nature, such, for example, as fire and water, may be so misused and perverted. Yet we do not prohibit or destroy their use. We endeavor only to regulate it.

In the purer and better days of the Republic, "a well-regulated militia was regarded as necessary to the security of a free state;" and it was declared in the first amendment to our National Constitution, that "the

right of the people to keep and to bear arms should not be infringed."

So, "by the Anglo-Saxon laws, or rather by one of the primary and indispensable conditions of political society, every freeholder, if not every freeman, was bound to defend his country against hostile invasion;" and by the statute of Winchester, 13 Edw. I., every man between the ages of 15 and 60 was to be assessed and sworn to keep armor according to the value of his lands and goods: for 15 pounds and upward in rent, or 40 marks in goods, a hauberk, an iron breast-plate, a sword, a knife and a horse; for smaller property, less extensive

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NOTE. KNOXVILLE, NOV. 4, 1871.

THOMAS PAGE *v.* THE STATE.

CARRYING ARMS. *Act of* 1870 *construed.* It is not every removal of a pistol or other weapon from place to place, that constitutes a "carrying" within the meaning of the act of 1870, c. 13, which prohibits carrying arms. To constitute the offense, the weapons must be carried as "arms."

FROM KNOX.

Criminal Court, May Term, 1871. M. L. HALL, J., presiding.

PROSSER, for the plaintiff in error, insisted, that under the Constitution the citizen was protected in an unlimited right to carry all kinds of arms without reference to size or quality, and had the right to keep and to bear arms at all times; the Legislature having the right to say how he shall wear them, but not to prohibit. The act of 1870 takes from the citizen the right to familiarize himself with the use of arms of the smaller class, and so infringes the Constitution.

Attorney General HEISKELL, for the State, insisted that carrying weapons carrying arms, means going armed. *To carry*, has many senses; to carry a scar; to carry a tune; to carry a loan. The word is not happily selected; but the objection is not, that it does not bear the exact meaning the Legislature intended to convey, but that it has other meanings, tending to confuse. A man may carry a wheelbarrow load of pistols to a shop; may carry them for repair, as merchandize; may carry in bundles, or boxes, or baskets; may

arms. See Hallam's Cons. Hist., 311. These laws were subsequently repealed or modified in the interests of despotic power. And Mr. Tucker, in his notes to Blackstone, says that "whoever examines the forest and game laws in the British Code, will readily perceive that the right of keeping arms is taken away from the people of England." See 1 Sharsw. Black., 143. A jealous concern for public liberty and personal security animated our patriotic ancestors to encourage the use of arms. It was once the policy, too, of our State Government to foster a martial spirit among the people, and to train them to the use of arms, not only for the purpose of

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carry pistols hunting, or to a gallery or tree to practice. In none of these cases would he be carrying them in the sense of the law. The law so construed, does not infringe the right to keep arms, or practice with them, or bear them for the common defense. Where a law admits of a construction consistent with the Constitution, it must be so construed: *Bristoe* v. *Evans*, 2 Tenn., 341, 345; *Bank of State* v. *Cooper*, 2 Yer., 596, 623; *Townsend* v. *Shipp*, Cooke, 294, 301; *L. & N. Railroad Co.* v. *Davidson Co.*, 1 Sneed, 637, 671; *Fisher* v. *Dabbs*, 6 Yer., 119, 135.

"Common defense," in the Constitution, has one of two senses. It can not have both. It either means defense as a community, or the individual defense of each man commonly, or on ordinary occasions. Now we know that it was intended to embrace the idea of general defense; it can not, therefore, mean the other, unless it be used in a double sense, in two opposite and distinct senses. The bearing of arms, then, is only protected on the occasions and when used in a manner appropriate to the public defense, as a citizen soldier. To keep for that purpose, necessarily includes the right to keep at all times and under all circumstances; but to bear for that use, means to bear on such occasions, at such times, and in such manner, as may be appropriate to that end. Not to *wear* weapons. It must mean after the fashion of a soldier, not after the manner of a cut-throat.

NICHOLSON, C. J., delivered the opinion of the Court.

Page was indicted for carrying a belt pistol, a pocket and revolver. Upon his trial, on the plea of not guilty, he was convicted, fined and sentenced to imprisonment. He has appealed to this Court. It appears from the evidence in the bill of exceptions, that Page was seen coming from his

national defenst, but also in cases of necessity, for the defense of their own persons. The tendency now appears to be the other way, and passive obedience and slavish submission to wrong and outrage would seem to be the growing spirit of the times. While "shooting matches" were once encouraged by the Legislature, as a proper method of accustoming the citizens to the use of arms, the timid course of existing legislation is to make the peace warrant the only potent weapon of defense, and to teach the people to "*have peace*" upon any terms, no matter how degrading.

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home along the big road, about a mile distant from his house, carrying in his hand, swinging by his side, a pistol called a revolver, about eight inches long, but that it was not such weapon as is used as a weapon of war. He was not on a journey, nor was he a public officer. No other instance of his carrying a pistol is proven. He approached prosecutor, presented the pistol and threatened to shoot him. Was this such a carrying of a weapon as is prohibited by the act of 1870, c. 13? Shankland, 95. The evidence fully establishes the fact, that the pistol carried by Page was not an arm for war purposes; and therefore, under the ruling of this Court in the case of *Andrews* v. *The State,* decided at Jackson, it was a weapon, the carrying of which the Legislature could constitutionally prohibit. But the question here is, what is the meaning intended by the Legislature to be conveyed by the word "carry"? It will be observed, that the prohibitory clause of the Constitution uses the words, "keep and bear arms," &c. The Legislature has avoided using this language, but has used a word, which, as connected with weapons, conveys the idea of "wearing weapons," or "going armed." When we use the expression, "he carries arms," we mean "he goes armed," or "he wears arms." This is manifestly the sense in which the word was used by the Legislature, and we know of no other single word which could more clearly convey the meaning intended to be conveyed, than the word "carry." In this sense, Page was not only literally carrying a forbidden weapon, but he was "carrying" it, that is, "he was going armed," contrary to the true meaning of the statute.

It will be observed, that the interpretation which we give to the word "carry," meets and carries out the manifest purposes of the Legislature, which was, not only to make criminal the habitual carrying or wearing of dirks, sword-canes, Spanish stilettos, belt or pocket pistols, or revolvers,

Regretting, as I do, that the nobler objects of bearing and wearing arms are too often and too horribly perverted, I can not approve legislation which seems to foster and encourage a craven spirit on the part of those who are disposed to obey the laws, and leaves them to the tender mercies of those who set all law at defiance.

I concur in the foregoing dissenting opinion.

TURNEY, J.

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but, also, to make criminal a single act of wearing or carrying one of these weapons, when it is so worn, or carried, with the intent of thus going armed.

But we are far from understanding the Legislature as intending to make every act of carrying one of these weapons criminal. Under the constitution, every man has a right to own and keep these weapons, nor is this right interferred with by the prohibition against "carrying" them, in the sense in which the Legislature uses the word. To constitute the carrying criminal, the intent with which it is carried must be that of going armed, or being armed, or wearing it for the purpose of being armed. In the case before us, the intent with which Page was carrying his pistol was fully developed. He was carrying it that he might be armed, as was shown by his threatened assault upon the prosecutor. It would probably be difficult to enumerate all the instances in which one of these weapons could be carried innocently, and without criminality. It is sufficient here to say, that, without the intent or purpose of being or going armed, the offense described in this statute can not be committed.

We think the facts proven, in the case before us, bring the plaintiff in error within the offense defined in the statute, and that his conviction was fully warranted by the evidence.

The judgment is affirmed.

John Henslie *v.* The State.

JOHN HENSLIE *v.* THE STATE.

1. TERMS OF COURT. *Time of opening.* A Term of the Circuit Court opened on Tuesday; Monday being the day fixed by law for its commencement; is a legal term, and an indictment and conviction for felony at such term is valid.

2. SAME. *If irregular, how waived.* If the term was not regular, the objection is waived by plea of not guilty and trial.

3. PRACTICE. *Motion to quash.* A motion to quash, if available, must be upon specific grounds, stated of record.

4. VERDICT. *Power of Court to enter.* A Circuit Judge, having erroneously directed a jury that their verdict fixing a term of imprisonment at two years and six months was bad, sent them out, when they fixed the term at three years. Discovering his error, he entered the verdict for the term which the jury first returned, and pronounced judgment. Held good.

5. SUPREME COURT. *Error. Judgment.* If the prisoner had been sentenced for the three years' term, it would have been error, for which the judgment would have been reversed or the judgment corrected by this Court.

6. ERROR. *Charge of Court. On point not raised by proof.* In the absence of proof of mania, it is held not to be error to charge that it makes no difference as to the prisoner's guilt, what sort of an impulse controlled him, nor how strong that impulse was, nor what produced it.

7. SAME. *Voluntary intoxication.* A charge that, if the defendant was so much under the influence of whisky as not to be conscious of what he was doing when he took the gun, then he would not be in a condition of mind to be guilty of larceny, was more favorable than the prisoner was entitled to, in view of his being voluntarily drunk.

FROM LAUDERDALE.

In the Circuit Court, January Term, 1871, T. J. FLIPPIN, J., presiding.

LATTA & RICHARDSON, for the prisoner, insisted that the indictment ought to have been quashed because the

Term did not open on the day appointed by law. Cited, Code, 4220, 4222. That the record did not show that the witnesses were sworn in open court, on the indictment; that there was error as to the verdict: citing, *Dougherty* v. *Shown*, 1 Heis., 302. That there was error in the charge as to *impulse*.

Attorney General HEISKELL, for the State, cited Act of 1809, c. 49, s. 3., which provides that "when any Circuit Judge shall fail to attend on the first day of the Term, the business *shall stand adjourned* until the second day," and so until the evening of the third day. So the law adjourned the cases, and allowed the court to stand open. Then the acts of 1815 and 1817, interpose a direction to the Clerk to enter the adjournments, and to take the recognizances, necessary forfeitures, &c. This act, so far as it requires the entries to be made, is directory, and leaves the court open if it be not pursued. Perhaps the Clerk could not perform the statutory act of taking recognizances, &c., so as to be binding unless he entered the adjournments strictly; but his failure could not prevent the court from standing open for the Judge when he came. The act of 1809 shows the thing to be done. The acts of 1815 and 1817 merely relate to the mode, and the failure in the specific mode will not defeat the primary intention that the court should not be lost.

But, independent of the statute, the failure to hold the court on the first day will not avoid the proceedings. In the case of *Chapman* v. *The State*, 2 Head, 41, there is a strong intimation that a court held at the old time,

under a repealed law, would be good. In *Womack* v. *Womack*, 17 Texas, 1, this very point was held. The same court decided that a court held at a different place from that appointed by law, on account of the incursion of enemies, was properly held.

In *Downey* v. *Smith*, 13 Ill., 671, it was held that the term is a term, though no judge attends. Though we have no facts but the simple announcement of the principle in a digest, it would seem that if it be a term, the judge could take it up at any point during its regular period of duration, unless it was terminated in some mode pointed out by law. The case of *Morrow* v. *Malone*, 5 Sneed, 643, requires pleadings to be filed, though the court does not attend.

The proof in the case is of the fullest and most satisfactory character. The defense of kleptomania is not in the slightest degree plausible.

The objection to the verdict would certainly have been good, if the court had entered it as last rendered; but the error of the judge was corrected by him, and entry made of the proper verdict. The temporary mistake has worked no injury, and the first rendering of the verdict, according to the statement in the bill of exceptions, was sufficient to authorize the entering of it on the record. The defendant was bound to ask the court to rectify the error, and he has done it without being asked.

NELSON, J., delivered the opinion of the Court.

The plaintiff in error was tried and convicted at a Term of the Circuit Court, began and held for the County of Lauderdale, on the first Tuesday after the fourth Mon-

day in January, 1871, being the same term at which the indictment was found; and it is now insisted that the Court was not lawfully held, because it was not opened on the fourth Monday of the month, the time prescribed by law.[1]

The Act of 30th June, 1870, p. 79, directs that the Circuit Courts for Lauderdale county, shall be held on the fourth Mondays in January, May and September. It is declared in the Code, 4220, that, "it is the duty of the Circuit Judge to attend and hold his court at the time appointed by law; but if, for any reason, he fails to appear, the clerk may open and adjourn the court for the first three days of the term; and if no Judge attend by four o'clock on the fourth day of the term, the court shall be adjourned by the clerk, until the court in course."

Section 4223 provides, that "none of the proceedings, pending in the Circuit Courts of this State, shall be discontinued by the non-attendance of the Judge at any term, or his death at any time; but, in such cases, all matters depending shall stand continued to the next succeeding term." And section 4224 provides that "the non-attendance of the Circuit Judge shall not prevent the parties from making up their pleadings in appearance causes."

In the case of *Venable & Co.* v. *Curd & White*, 2 Head, 582, it appeared that the time for holding the courts had been changed, by Legislative enactment, from the third to the fourth Monday; and, afterwards, at the

[1]See *Blynn* v. *Com'l*, *Law Reg. for Sept.* 1871, 577. (Ky.)

same session of the Legislature, from the fourth to the third Monday, and that the Circuit Judge, ignorant of the change, held the court on the fourth Monday. But it was held by this court, that the public acts of officers *de facto* are often valid, though the authority under which they act is void, and that public convenience, as well as public justice, require that they should be supported: *Ib.*, 585, 586. Judge Wright, in delivering the opinion, said: "There can be no doubt whatever, upon reason and authority, that a judgment given by a judge, *de facto*, sitting and holding the court at the proper time and place, is as valid and free of error as a judgment pronounced by a judge rightfully in office. If so, upon what reason shall we hold that the judgments and decrees of a judge regularly in office are erroneous, because he held his court under color of a law that turned out to be repealed or invalid?"

Public justice, in our opinion, demands that the views announced in that case shall apply as well to criminal as to civil cases. If it did not, we hold that, as the plaintiff in error went to trial without making any objection to the jurisdiction, he can not now make it under the general motion to quash, entered in the Circuit Court, which does not state any ground for making the motion. In addition to this, it is, by no means, clear that the court was not lawfully and properly holden, although it does not appear that the clerk opened and adjourned the court from Monday until Tuesday. Under the act fixing the times of holding the Circuit Courts in Lauderdale, the court, at which the indictment was found and the cause tried, might have con-

tinued its sitting until near the third Monday in February, and the legal term would have been from the fourth Monday in January until it was necessary to adjourn in order to hold another court commencing on the third Monday in February. The interval between the two periods, or any shorter period during which the term was actually held, would be the legal term of the court; and the judge might, very properly, open the term at any time between the day designated by law and the fourth day, when it was the duty of the clerk to adjourn the court *sine die.* Under section 4224, the term was open for the purpose of making up the pleadings in civil suits; and section 4220 expressly treats the four days as parts of the term. Section 4223 guards against a discontinuance on account of the non-attendance of the Judge at any term, but evidently implies that he may attend and commence the term, by presiding in court at any time before four o'clock of the fourth day, when the clerk is compelled to adjourn it. If he does not attend before the prescribed hour of the fourth day, then, but not until then, the term is at an end; and, under section 4224, all matters depending stand continued until the next succeeding term.

The bill of exceptions states, that, "the jury returned into court and rendered a verdict that they found the defendant guilty of petit larceny, and assessed the term of his imprisonment, in the Penitentiary of the State, for the period of two years and six months, when the court directed the jury to remodel their verdict; that they could not return fractions of years; and directed them to return and reform their verdict in that respect.

The jury, after retiring, returned into court and rendered the following verdict: 'We, the jury, find the defendant guilty of petit larceny and fix his term of imprisonment, in the Penitentiary of the State, for the term of three years;' which verdict was received by the court and the jury discharged; to all of which, defendant excepted. At a subsequent day of the court, the defendant moved the court for a new trial of the issues herein, and in arrest of judgment; which motions were, by the court overruled; and the court proceeded to pronounce judgment, sentencing the defendant to imprisonment in the Penitentiary for the term of two years and six months; to all of which, as well as the charge of the court, the defendant excepted." It is earnestly contended, for the plaintiff in error, that this action of the Circuit Court was so erroneous, that it entitles him to a reversal of the judgment.

Under the provision of our Constitution, that "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law," there are no duties of a Circuit Judge which are, perhaps, so delicate, or difficult, as those which concern the maintenance of the exact relations between the court and the jury, especially in criminal cases; but we do not perceive that the court invaded the province of the jury in this case. It was, unquestionably, his duty, in instructing the jury as to the law, to state its provisions, as to the term of imprisonment, and to leave it to them to determine it in the event they found the defendant guilty. His instruction, that the jury could not find a term of imprisonment for a certain term of years and

the fraction of a year, within the time prescribed by law, was clearly erroneous, as it was competent for the jury, in their discretion, to fix any period between the lowest and the highest number of years designated in the statute. But it is very manifest that he corrected the error; for the verdict, as entered upon the minutes, shows that "the jury, upon their oath, do say they find the defendant, John Henslie, guilty of petit larceny, and assess the term of his imprisonment in the State Penitentiary, at two years and six months." Had the court received and acted upon the second verdict, and sentenced the defendant to three years' imprisonment, it would have been such an error against him, as that the judgment should be reversed, or, at least, under our statutes, corrected by this court. But there can be no question, upon the bill of exceptions, that the jury, on each occasion, returned a verdict that they found the defendant guilty of petit larceny; nor can it be doubted that, in their first verdict, they fixed the term of imprisonment at two years and six months; but, under the erroneous instructions, returned a verdict, on the second occasion, fixing the term at three years. Neither verdict, under our practice, could have been, immediately, entered upon the minutes, or record book, of the court, as it is well known, that, in practice, the daily proceedings are briefly entered by the clerks upon their "rough minutes," or memoranda, which form no part of the record, and are, generally, entered, at large and in proper form, upon the record book between the time of the adjournment of the court on the day of the proceedings and its meeting on the next day; when, by express statutory provision, the record, thus

carefully prepared, is required to be read in open court, before it is signed by the judge, not only with a view to the correction of any errors, or mistakes, which may have been committed by the clerk, but for general information. During the term of the court, the record is entirely within the control of the presiding judge; and no good reason exists why, in a case like this, he might not correct his own error by causing the record to show the result ascertained by the first verdict, and treating as a nullity the subsequent action of the jury occasioned by his own mistake. The record, as finally made up, does not speak falsely, as it is expressly shown in the bill of exceptions that the jury did return the verdict there entered, and that the second verdict, if it may be so styled, was a repetition of the first, with the erroneous addition of six months' imprisonment, which was reduced by the court, in favor of the prisoner, and before making up the record, so as to conform to the first, and only proper, verdict of the jury.

There is nothing in the opinion, in *Dougherty* v. *Shown*, which militates against this conclusion, for it is there expressly said that "the verdict of the jury, as originally returned, was their deliberate view of the justice of the case, and no one had the right to interfere with their conclusions": 1 Heisk., 305. In that case, it seems that the jurors were re-assembled, after rendering their first verdict, and that there was, perhaps, an improper interference on the part of the Attorney for the plaintiff, and that the court, against the express objection of the defendants, proceeded to give an additional charge, under which the first ver-

dict, which was against two of the joint defendants for eight hundred dollars damages, and against three other joint defendants for five thousand dollars damages, was, after the jury had retired twice, changed to a joint verdict against all the defendants. The jury believed that separate damages should be assessed, but, under the instructions of the court, were compelled to change their verdict entirely, as to the defendants whom they believed least guilty, and to involve them in the same category as the other and most guilty defendants, and thus to render a verdict to the prejudice of the least guilty parties. But here there was no change to the prejudice of the defendant. The jury, on both occasions, found him guilty; and the injury which would have been done by the last action of the jury, if it had been adopted by the court, was not done; and the first verdict of the jury, which was properly rendered, and was, in fact, the only action that can be denominated a verdict, was correctly entered upon the record as their action.

Among other things, the court charged the jury that, "it makes no difference, as to his guilt, what sort of an impulse controlled him, nor how strong that impulse was, nor what produced it. The only question for you to look at, in considering whether he is guilty of larceny, is, did he know, at the time that he took the gun, it was not his"? It is argued, for the plaintiff in error, that if the impulse to take the gun was irresistible and "the man had no power to control his will," there could be no felonious intent. But the facts presented in this record do not show a case of

kleptomania, and it is not necessary to consider that occult and mysterious subject. The material facts of the case are few. It appears that the plaintiff in error, who was a stranger to J. A. Campbell, the prosecutor, was at the prosecutor's store on three consecutive days, about the 20th January, 1871; that he was drinking, and perhaps intoxicated; that he went with the clerk to the dwelling house, where he took supper and remained until 9:30 o'clock, P. M.; that the prosecutor invited him to remain all night, without charge; that by this time he was nearly sober, and returned with the clerk to the store; that he and the clerk went back to the house about ten o'clock, when the clerk showed him the room in which he was to sleep; that he remarked he would not go to bed for about two hours, as he wished to read a book; that the clerk closed the door and left him; that he returned early next morning to wake him for breakfast, but found he was gone and that the bed had not been occupied, and then discovered that the shot gun belonging to the prosecutor, and which he had seen on the previous morning, was missing. The discovery was made on Friday morning. Pursuit was made, and the plaintiff in error was arrested on the next day, about twenty-two miles distant, at the house of a negro man named Florence, when he acknowledged he had taken the gun and also a book and coat; but said that if it had not been for whisky he would not have done it. It is in evidence that on Friday morning, between the hour of midnight and daybreak, the plaintiff in error stopped at Lowery's house, about five miles distant from the prose-

cutor's, having the gun with him; that he said it was worth twenty-five dollars, but offered to sell it to Lowery first for ten, then for eight, and last for four dollars cash and to wait for the balance; that defendant was not drunk at the time, but remained and took breakfast with the witness. At about one or two o'clock on Friday, the plaintiff in error stopped at the house of McGuire, about four miles from Fulton, having the gun with him and again offering to sell it. He was not drunk or drinking at the time, and left there on Saturday morning, starting towards Fulton. Florence (the negro) states that he met the plaintiff in error at the twelve mile post from Fulton; that he stopped witness and asked him where he could stay that night, and stayed at the house of witness, with whom he made an arrangement to assist him across the Mississippi river next morning; that he had a bottle about half full of whisky, and "was merry and drinking, but not drunk;" that he got another bottle and became "pretty drunk;" that he was arrested next morning before day by those who were in pursuit, and that part of the whiskey was then still in the bottle.

His Honor, the Circuit Judge, expressly instructed the jury that, "if the defendant was so much under the influence of whisky as not to be conscious of what he was doing when he took the gun, (if the proof shows he did take it,) then the defendant would not be in a condition of mind to be guilty of larceny," and, in other respects, fully and fairly submitted the case to the jury. The charge was more favorable to the plaintiff in error than he was strictly entitled to in view of his voluntary

drunkenness. There is nothing in the record to show that he suffered from *delirium tremens* or other mental incapacity. It appears from the weight of evidence that he was sober when he took and carried away the gun, and also when he offered to sell it; and if his mind was in any way affected by his potations, the arrangement he made to cross the Mississippi river clearly shows that there was "method in his madness."

Two physicians were examined on the trial as to the probable effect of the use of spirituous liquors for several days upon the mind of complainant, one of whom stated that he would consider him morally responsible; and the other that "he would suppose that defendant's *nature*, in this respect, was somewhat impaired." While nothing can be more cruel or inhuman than the punishment, under the forms of law, of one who is an imbecile, or of unsound mind, and is incapable of discriminating between right and wrong, a guilty defendant should not be permitted to escape upon the mere abstract and hypothetical opinions of physicians who often disagree, as in this case, in their conclusions.

The case was fairly submitted to the jury, who reached a correct conclusion, and there being no error in the record, the judgment is affirmed.

Lewis Rice v. The State.

LEWIS RICE v. THE STATE.

1. INDICTMENT. *Conclusion* contra pacem. The constitutional provision, Art. 6, s. 12, that indictments shall conclude, "against the peace and dignity of the State," is imperative, and makes those words essential to the validity of an indictment.

2. SAME. *Same. Not required in each count.* It is not necessary that each count of an indictment have this formal conclusion; if the whole so conclude, it is sufficient.

   VERDICT. *On good and bad counts.* Where there are good and bad counts in an indictment, upon a general verdict of guilty, the Court will presume that the finding is responsive to the good and not the bad counts.

4. SAME. *Same.* Where the proof is set out, and relates to the bad count only, the judgment should be arrested. Where it relates equally or properly to both, the verdict and judgment will be good.

5. PRACTICE. *Production of papers in evidence.* Money orders, alleged to have been stolen, if in court, must, on demand of the prisoner, be submitted to the jury.

6. DECLARATIONS. *Denying guilt, not error to admit.* Where the prosecutor, by means of promises, induced the defendant to show him stolen articles, and his declarations were received that he received them from another, not knowing that they were improperly obtained, the admission of the statement was held not to be error against the prisoner.

6. RECEIVING STOLEN GOODS. *Intent.* A charge that, if the prisoner received the property, knowing it to be stolen, he was guilty of a crime, is erroneous, unless it further state that he must have fraudulently intended to deprive the owner thereof.

FROM GIBSON.

Circuit Court, October Term, 1870. Before GID. B. BLACK, J.

JAMES ELDER and R. P. RAINS, JR., for the prisoner.

Lewis Rice *v.* The State.

Attorney General HEISKELL, for the State.

SNEED, J., delivered the opinion of the Court.

The prisoner appeals in error from the judgment of the Circuit Court of the county of Gibson, upon a general verdict of guilty under an indictment containing two counts, the first an accusation of grand larceny, and the second charging the crime of receiving stolen goods of greater value than ten dollars. The verdict is in the form following: "The said Lewis Rice is guilty in manner and form as charged in the indictment, and the jury, upon their oath, do further say, for the offense aforesaid, the said Lewis Rice shall undergo confinement in the Penitentiary of the State for the period of five years."

The property so alleged to have been stolen or feloniously received, was a pocket-book belonging to Dr. McGhee, containing United States treasury notes and National Bank notes of various denominations, set out and described in the indictment, and two money-orders described in the indictment as "one piece of paper having thereon a money-order for twenty-five dollars, of the value of twenty-five dollars; and one other piece of paper having thereon a money-order for twenty dollars, of the value of twenty dollars. The value of the pocket-book is stated in the indictment at one dollar, and its contents at about two hundred dollars in the aggregate. The facts are, that Dr. McGhee had employed the prisoner, and one Green Davidson, both colored men, to remove his furniture from one room to another, in the town of Trenton. While the furniture was being re-

moved, Dr. McGhee left the house and walked down into the town. In a short time he missed his pocket-book, containing the valuables charged to have been stolen, and remembering that he had left the pocket-book secreted between the mattresses upon which he had slept the night before, he returned to the house and found that the mattresses and other furniture had been removed, and the pocket-book could nowhere be found. At once suspecting that one of his two employès had taken his pocket-book, he obtained a search warrant and searched their houses, but without finding the lost property. He then determined to examine each of his employès separately, and to this end he took the prisoner into a private room. His interview with the prisoner is thus narrated by Dr. McGhee in his testimony: "I said to him, now Rice, if you will tell me all about my money, I will not prosecute you, and I will give you five dollars." The prisoner then remarked to him, "If you will go with me, I will." They then went off together, and went into the lot where the prisoner lives, or one adjoining, and the prisoner dug into the ground and dug up a tin box which had in it one hundred and fifty-five dollars in money and the two money-orders, one for twenty-five dollars and the other for twenty dollars, and he then dug a little farther and produced the pocket-book, and handed it to the witness with the money and orders, and remarked, this money and the pocket-book Green Davidson gave me, requesting that I should take care of it for him. I did so, but I did not know where he got the money." To the introduction of this con-

fession, the prisoner, by his counsel objected; but the objection was disallowed by the court, and the confession went to the jury. The identity of the pocket-book was established, but its value was not proven. The witness believed that the money so found was his property, but he could not swear positively, and only thought the money was his from the worn condition of one of the bills of twenty dollars. The money had all been disposed of before the trial, and could not be produced upon the demand of the prisoner. In describing the money, the witness stated that he had some twenties, some tens, and some five dollar bills; some of which he was satisfied was what is commonly called greenbacks, and some what was called National Bank currency. Whether the twenties were all greenbacks, or some National Bank currency, or whether some of the tens were greenbacks, or some National, or whether some of the fives were greenbacks or some National Bank currency, he could not tell. There were some twenty dollar bills of greenback in the money he obtained from the prisoner that were a little worn and old. That he remembered very well to have had one in his pocket-book of a similar character, and "it looked like his;" but to say any of them were his, he could not, from any private mark. He had received them all at the value they purported to be, believing that they were his, and he passed off the twenty dollar bill as currency as twenty dollars. The two orders he considered of value to the amount they called for, and a portion of one of them had already been paid to him." The prisoner's counsel called for the production of the orders,

and that they be read to the jury, the witness having the orders in his hands. The court refused to permit the orders to be read to the jury, to which ruling the prisoner excepted. The prisoner introduced Mrs. McGhee as a witness in his behalf. She testified that the prisoner and Green Davidson were both at her house that morning, and were removing the furniture from the usual sleeping room to another room; but before they had completed the job, Green Davidson left and went to Mrs. Seat's, the adjoining, lot. An inquiry was made as to why he had gone, and the reply was that he had gone for water. The witness remarked that there was plenty of water there. He returned, however, and the two continued the removal of the furniture, which was finished just before dinner, and the prisoner left first. Before he left, something was said about paying him, to which he replied, it made no difference. Then Green Davidson left, and both had left before Dr. McGhee returned to his dinner. In the course of the testimony of this witness, she stated that Dr. McGhee said, that when the mattresses were moved, Green Davidson was in another room. To this statement there was no exception by the prisoner, and there was no ruling upon it by his Honor, the Circuit Judge.

As already stated, there were two counts in the indictment: the first charging the offense of larceny; and the second, that of receiving stolen goods, knowing them to be stolen, with intent to deprive the true owner thereof. The count for receiving stolen goods concludes with the words "contrary to the peace and dignity of the State;" but the count for larceny has no such con-

clusion. The prisoner demanded to be tried upon the count for receiving stolen goods, and called upon the Attorney General to enter a *nolle pros.* as to the other count, which was refused, and the prisoner was tried upon both counts. The verdict, as will be seen, was a general verdict of guilty, as charged in the indictment. The charge of the Court, after defining the distinction between grand and petit larceny, and correctly charging the law as applicable to those offenses, and after giving the prisoner the full benefit of the doctrine of reasonable doubt, and all other defenses merely technical, proceeds as follows: "If you find from the proof that he stole the goods or money, as stated above, and that they were of the value of ten dollars or under, he would be guilty of petit larceny. If he received the goods or money, knowing them at the time to have been stolen, he would be guilty of a crime, the penalty of which was the same as if he had stolen them himself. There are two counts in the indictment. You may find him guilty on one, and acquit him on the other, or you may find a general verdict of guilty."

Upon this record, a number of questions are made, and upon each the opinion of the Court is requested. And premising that, for some of the alleged errors of the law, the cause must be remanded for a new trial, we forbear from criticizing the facts, and proceed at once to consider the errors of law as they arise upon the record.

An indictment in this State, that does not conclude "against the peace and dignity of the State," is a nullity. It is a positive injunction of the Constitution

itself, that such shall be the conclusion of every indictment. It is, therefore, a matter that can not be affected by legislation, and a defect that can not be ignored by the courts. An indictment without these words is not an accusation of crime, and not an indictment in the sense of the Constitution. No conviction upon such an indictment could be permitted to stand; and a prisoner can not waive his rights in this respect, as it is the imperative mandate of the Constitution, that all crimes shall be prosecuted by presentment or indictment, and that all indictments shall conclude, "against the peace and dignity of the State." By the statute, 37 Hen., 8, c. 8, the words *vi et armis, viz: baculis, cultellis, arcubus et sagittis*, or such other like, shall not, of necessity, be put or comprised in any inquisition or indictment. And "exceptions to indictments omitting these words have often been answered by this Court by quoting this old statute." *Tipton* v. *The State*, 2 Yer., 542; *Taylor* v. *The State*, 6 Hum., 285. And by our Code, the words "contrary to the form of the statute," and other words merely formal, are dispensed with, such as are not essential in the description of the offense: Code, 5115, *et vid.* 2 King's Dig., § 4950: But the conclusion, "against the peace and dignity of the State," can not be dispensed with.

It is held that each count in an indictment must be a complete indictment in itself. This, we think, refers to the description of the offense, and not to the formal conclusion. And it seems that the good and bad counts may, by apt reference and averment, become so incorporated in each other, that the principal count and the matter bor-

rowed for the other, may constitute together a complete accusation: *The State* v. *Lea*, 1 Cold., 175. The count of the indictment now in judgment, which charges the larceny does not conclude "against the peace and dignity of the State," and if it stood alone, would be bad for want of the proper conclusion. But the last count does have the proper conclusion; and we hold this to be sufficient, and that the conclusion "against the peace and dignity of the State" in the last count, relates to all other preceding counts. And in this case, the verdict is general; and even if one count were fatally defective, the established rule here, as in in England, is, that at common law, upon a general verdict of guilty upon an indictment containing several counts, where some are good and others bad, the Court will pronounce judgment upon the good counts, upon the presumption that it was to the good counts the verdict attached: 2 Whart. Cr. L., § 3047. And such is now the provision of our statute upon the subject: Code, 5217. This practice was sustained by this Court in the case of *Isham* v. *The State*, 1 Sneed, 113. This presumption of law, however, that the general verdict of guilty was responsive to the valid count, and not to the defective count, is not conclusive, but *prima facie*. In a case where the proof is fully set out in the bill of exceptions, if it be clear upon the facts that the verdict is not responsive to the valid count, presumption would fail, and upon such a conviction, the judgment should be arrested. In this case, we can not say upon the facts that the verdict specially attaches to the count alleged to be bad for want of the proper conclusion, and therefore the presumption of law

would relieve us of all difficulty on that question, even if we held the exception fatal.

We think there was error in the ruling of the Court, in disallowing the prisoner's demand for the production and reading of the money orders referred to in the proof. These papers being in court, and in the hands of the witness, and being an important link in the chain of testimony against the prisoner, he had a right to criticise and test their identity as well as their value. In the case of *Pyland* v. *The State*, it was held that, if any question be made as to the genuineness of the bank notes alleged to have been stolen, the Court should require the prosecutor to produce the notes, if in his possession. If he fail to produce them when required, it will be a strong circumstance in favor of the prisoner: 4 Sneed, 357.

The confession of the prisoner was evidently and clearly superinduced by the fear of a prosecution or the hope of a reward. Though he does not confess himself guilty—and though it be the general rule that confessions must be taken all together—yet, in view of the manner in which the stolen property was concealed, the confession under the circumstances, if unexplained, covers the prisoner with a fatal suspicion. It is a familiar rule of criminal evidence, that though a confession be improperly obtained—as by hope of reward or threats of punishment—yet, if important facts be discovered by it, so much of it as discovers said facts is admissible: *Deathridge* v. *State*, 1 Sneed, 75. And a good illustration of this rule is given in the case of *Hudson* v. *The State*, 9 Yer., 408, where it is held, that if the

prisoner in an improper confession, point out the place where the stolen property is found, the presumption of guilt arises against him, and the burthen of proof devolves on him to reconcile his knowledge with his innocence: 2 King's Dig., 151. The reasons for excluding confessions of guilt when made under stress of improper influence, as by threats or promises, is the great probability of their being untrue. In Deathridge's case it is said, that, in such case, it is competent to prove that the prisoner stated or pointed out the place, and the goods were found there. But it is not competent to prove further, that the prisoner said he put the goods there. This case is supported by the ancient authorities on this subject. Thus it is said, that although a confession obtained by means of promises or threats can not be received; yet if, in consequence of that confession, certain facts tending to establish the guilt of the prisoner, are made known, evidence of these facts may be received: Roscoe Cr. Ev., 50; *Com'l.* v. *Knapp*, 9 Pick., 496; *State* v. *Crank*, 2 Bailey, 67. A fact, it is said by the court, in 1 Leach, 264, if it exists at all, must exist in the same manner, whether the confession from which it is derived, be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proven, without calling in the aid of any part of the confession from which they have been derived. The most that is proper, said Mr. East, to be left to the jury in such case, is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner having

stolen or put them there, which is to be collected or not from all the facts in the case: 2 East's P. C., 658. Such a confession, it is said, may be evidence only of the fact that the prisoner was acquainted with the other fact which he disclosed; and that so far as such knowledge goes, it is evidence to convict him of the offense. The leading case of Warickshall, so often referred to in the books, was very similar to the case now in judgment. The prisoner was indicted as receiver of stolen goods, and in consequence of promises of favor, made a full confession; and according to that confession, the property was found at her lodgings concealed between the sackings of her bed. It was held, the evidence of the finding was admissible: 1 Leach, 263; Roscoe Cr. Ev., 51. Applying these principles to the case in judgment, we hold, that so much of the statement of the prisoner as disclosed the place of concealment of the property, was very properly admitted to the jury, the same being found to be true, by finding the property in the place designated by him. The statement, however, expressly disclaims and denies all guilt in the premises, and the only feature of it that could be of value to the prosecution, is the discovery of the important fact, that the prisoner himself had concealed the goods, and that the statement has discovered the place of their concealment. And these are circumstances which may well be considered by the jury against the prisoner, in the absence of any satisfactory explanation. The burthen of proof is upon the prisoner now, to reconcile his knowledge with his innocence.

We come to consider and dispose of the last excep-

tion in the case, as presented in the argument. The court charged the jury, after fully and correctly charging the law upon all other points involved, that, "if the prisoner received the property, knowing it to be stolen, he was guilty of a crime." The prisoner had a right to a full exposition of the law upon this subject, and a full definition of the offense of receiving stolen goods. The mere receipt of stolen goods, knowing them to be stolen, is not of itself a crime. For such receiving may be for the most honorable purposes. The essence of the offense is, that the receiving of stolen goods knowing them to have been stolen, is accompanied by fraudulent intent to deprive the true owner thereof. This is the offense, and it must be thus charged in the indictment, as it is in this case, and it must be shown in the proof by such circumstances as leave no reasonable doubt of the guilty knowledge. Unless there be evidence showing this knowledge, either direct or circumstantial, the prosecution must fail: Vide *Bedford* v. *State*, 5 Hum., 552; *Hurell* v. *State*, 5 Hum., 68; *Wright* v. *State*, 5 Yerg., 154; *Cassels* v. *State*, 4 Yerg., 149.

We hold, therefore, that the court erred in this portion of the charge to the jury; and for this and other causes herein indicated, the judgment is reversed, and the case remanded for a new trial.

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JOHN CRAIG *v.* THE STATE.

VENUE. *Offenses committed beyond the State.* The provision in the Code, 4981, for the punishment of offenses committed within five miles of the State line, on board of vessels engaged in navigating waters of the State, is unconstitutional.

Cases cited: *Armstrong* v. *State*, 1 Col., 338; *Kirk* v. *State*, *Ib.*, 344; 3 Head, 544; 9 Hum., 657, 659.

FROM SHELBY.

Writ of error to the Criminal Court. The prisoner was tried before JOHN R. FLIPPIN, J., at September Term, 1870.

WALKER & HORRIGAN, for the prisoner, insisted that the Code, 4981, was unconstitutional, citing *Simpson* v. *State*, 4 Hum., 456; Code, 4977, 4697; *Rex* v. *Prowes*, 1 Moody Cr. C., 349; *Armstrong* v. *The State*, 1 Cold., 338; *People* v. *Gardner*, 2 John., 477; *People* v. *Schenk*, 2 John., 479; Cowen's Cr. Dig., p. 632; *Reg.* v. *Madge*, 9 C. & P., 29.

Attorney General HEISKELL, for the State, insisted that it was within the power of the Legislature to provide for the punishment of offenses committed on vessels engaged in navigating the waters of the State, even while they are beyond the boundary of the State. That every maritime state had such laws: 1 Archb. Cr. L., 234, *et seq.*

That such law was not within the prohibition of the Constitution. It was not the evil to be remedied: never

had been complained of. A similar provision in the Constitution of the United States, Art. 6, of the Amendments, did not prevent their punishing crimes on the high seas. It is not within the words of the Constitution. The right to be tried by a "jury of the county in which the crime has been committed, can have no application to an offense not committed in any county, of this State. The spirit of the Constitution, as to these offenses, is preserved, if the place of trial is defined beforehand.

NELSON, J., delivered the opinion of the Court.

The prosecutor stated, among other things, in his evidence upon the trial of defendant in the Criminal Court of Shelby County, that he and defendant were deck passengers on the steamboat G. W. Cheek, bound for her home port at Memphis; that the boat laid up for repairs, on the Arkansas side of the Mississippi river, about two or three miles below the Tennessee State line; that he and defendant laid down together at night, on the deck of the boat, with their clothes on; that before lying down, witness examined the pocket-book containing the money mentioned in the indictment; that he fell asleep with it in his pantaloons pocket, and, on waking in the morning, found that the pocket-book and money had been stolen; that, after searching, without success, at the place where he had slept, he asked the defendant if he knew anything about it, and received the reply that he did not; that, after the repairs were made, the boat proceeded through a considerable part of Shelby county, on her voyage to Memphis, where she

was finally moored; that witness then had defendant arrested by a policeman, who found the pocket-book and money upon his person, and took them away from him.

On this state of facts, his Honor charged the jury, upon the trial of this indictment for larceny, "that section 4981 of the Code of Tennessee was constitutional and valid," and read said section to the jury as the law of the land; to which action of the court the defendant, in due form, excepted.

It is provided by the said section, that "when an offense is committed within this State, or within five miles of the line thereof, on board a boat or vessel, engaged in navigating the waters of the State, the jurisdiction is in any county through which the boat or vessel is navigated in the course of its voyage, or in the county where the voyage shall terminate."

In behalf of plaintiff in error, who was convicted on the charge of larceny and sentenced to three years' imprisonment in the penitentiary, it is insisted, that said section of the Code is unconstitutional, being in violation of that part of section 9 of the Declaration of Rights which declares that, in all criminal prosecutions by indictment or presentment, the accused hath the right to "a speedy public trial by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself."

A question very similar to this, was determined by this court in *Armstrong* v. *The State*, 1 Cold., 338. It arose upon section 4976 of the Code, which declares that "when an offense is committed on the boundary of two

or more counties, or *within a quarter of a mile thereof*, the jurisdiction is in either county;" and said section was declared to be in violation of the Constitution, because it forced the defendant "to submit to an indictment and trial in a different county from that in which the offense was committed:" *Ibid.*, 344. At the same term of the court, it was determined, in a case where the venue was changed against the prisoner's consent, from one county to another, after exhausting a panel of seven hundred jurors, and selecting only eight out of that number, that section 5195 of the Code, which provides for a change of venue under such circumstances, is in violation of the same provision in the Declaration of Rights, and, therefore, unconstitutional. *Kirk* v. *The State*, 1 Cold., 344. See, also, 3 Head., 544; 9 Hum., 657, 659.

There is no difference, in principle, between these cases and the section of the Code now under consideration. The Convention which recently formed the new Constitution of this State, permitted the clause in the declaration of rights, to remain unaltered, with a full knowledge, as is to be presumed, of the decisions above mentioned, which, in our judgment, rests upon sound principle, and ought not to be disturbed.

The acts of Congress which provide for the punishment of crimes and misdemeanors committed upon the high seas and the lakes and navigable waters of the United States, not subject to the jurisdiction of the States, are founded, in part, upon that clause which gives Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against

the law of nations;" and are further authorized by Art. 3, s. 2, of the National Constitution, which, among other things, declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," and are not in conflict with the sixth amendment, which declares that "the accused shall enjoy the right of a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed." See 1 Curtis' Com., §§ 37, 40, 45; 1 Bright. Dig., 207, and notes, 2 Abbott's Nat. Dig., pp. 77, 79; 2 Story on Const., §§ 1781, 1791; *Ibid*, § 1162.

These provisions of the National Constitution, and the opinions pronounced upon the statutes enacted under them, are not in conflict with the former decisions of this court, and there is no provision in our State Constitution as to admiralty and maritime jurisdiction.

We express no opinion as to whether, upon the facts, the case is within the principles announced in *Simpson* v. *The State*, 9 Hum., 459, 465, as the plaintiff in error is entitled to a new trial, for the reason above mentioned.

Reverse the judgment and remand the cause.

CHARLES WILSON *v.* THE STATE.

1. CONSTITUTIONAL LAW. *Right of accused to be heard.* Under the Constitution of the State, Art. 1, s. 9, giving to a person accused the right to be heard by himself and his counsel, the right conferred is not to make a sworn or unsworn statement of facts not otherwise proved, but to argue the case upon the facts in evidence.
2. CONFESSIONS. *When voluntary.* Where a prosecutor, pursuing a prisoner, came up with him in the road, drew his gun, and ordered him to halt, and his brother coming up, said the prosecutor ought to have shot the prisoner, when the prosecutor said to the prisoner he should not be harmed; and thereupon the parties proceeded two and a half miles, when the prisoner confessed. Held admissible in evidence.

FROM SHELBY.

Error to the Criminal Court, July Special Term, 1870, JOHN R. FLIPPIN, J., presiding.

HORRIGAN, for prisoner, cited *People* v. *Thomas*, 9 Mich., 314; *Regina* v. *Malings*, 8 C. & P., 242; *Reg.* v. *Walking*, 8 C. & P., 243; *Reg.* v. *Frost*, 1 Mod. State Trials, 71; Webster's Trial, p. 449.[1]

Attorney General HEISKELL, for the State.

SNEED, J., delivered the opinion of the Court.

The prisoner was put upon his trial before the Criminal Court of Shelby county, at the July Special Term of said Court, 1870, upon his plea of not guilty to an indictment for grand larceny. He was found

[1] And see *Reg.* v. *Mears*, 1 Ben. & H., 465.

guilty, and his term of confinement in the Penitentiary was fixed by the jury at the period of five years. His motions for a new trial and in arrest of judgment being overruled, judgment was pronounced according to the verdict, and the prisoner appealed in error. Having abandoned his appeal, and having been committed in pursuance of the verdict and judgment, his counsel has presented the record of the cause here, upon an application for a writ of error, which was granted, and the prisoner arraigned at the bar of this Court.

Among the errors of law assigned here, upon which a new trial is demanded, is the refusal of the Court to allow the prisoner to make his own statement before the jury, in regard to the offense of which he was accused. The application, and ruling of the Court upon it, are thus set forth in the bill of exceptions: "The defendant announced that he had no witness to be examined. He then moved the Court to be permitted to make an unsworn statement in regard to the charge for which he was indicted and then on trial, to the Court and jury, which motion was overruled and refused by the Court." The prisoner had a right to make an explanation of the facts in proof against him, and to make an argument upon them in his own behalf; but he had no right to state any facts not in proof; and the majority of the Judges are of opinion, the writer dissenting, that the Court did not err in its ruling upon the prisoner's application.

We are not aware that the clause of the Constitution of this State, which guarantees to a person accused of crime the right to be heard by himself and counsel,

has ever been before this Court for construction. The section of the Constitution in which this privilege is secured, is in the words following:

"That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial by an impartial jury of the county or district in which the crime shall have been committed; and shall not be compelled to give evidence against himself:" Art. 1, s. 9.

In order to effectuate the right of the accused in this respect, it was provided by statute, that, "in all criminal prosecutions, the accused is entitled to a speedy trial, and to be heard in person and by counsel:" Code, 4992. This provision is general, and applies to all criminal prosecutions, in whatever form they may be had. There is a special enactment elsewhere in the Code, which defines the duty of the justice upon a preliminary investigation, when the accused is arraigned before him. This provision is in the words following:

"When the examination of the witnesses on the part of the State is closed, the magistrate shall inform the defendant that it is his right to make a statement in reference to the charge against him, or that he may waive the same; and such waiver can not be used against him on the examination before the magistrate, or on trial. The magistrate may, with the defendant's consent, put to him the following interrogatories only:

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1. What is your age? 2. Where were you born? 3. Where do you reside, and how long have you resided there? Give any explanation you think proper of the circumstances appearing in the testimony against you, and state any facts which you think material to your defense. After the waiver of the defendant of his right to make a statement, or after he has made it, his witnesses, if he produces any, may be sworn and examined." Code, 5057, 5059, 5060.

The right of a prisoner to be heard by himself and his counsel is only guaranteed by the State Constitution. It will be observed that the Constitution of the United States gives him the right to have the assistance of counsel in his defense, while the Constitutions of the other States of the Union give him the right to be heard by himself or his counsel. It was not among the boasted liberties of the English subject, vouchsafed by *Magna Charta*, that a prisoner could either be heard in his own defense by himself or his counsel. The great guaranty, that no freeman shall be taken or imprisoned, or disseized from his freehold or liberties or immunities, nor outlawed, nor exiled, nor in any manner destroyed; nor will we come upon him or send against him, except by legal judgment of his peers or the law of the land; we will sell or deny justice to none, nor put off right or justice;" though it secured to the Englishman the right of trial by jury, and is the chief corner-stone of the solid fabric of British freedom which exists at this day, and the foundation of our own fervid liberty, was yet wanting in some humane provision by which the unfortunate citizen accused of felony or treason, might

have an opportunity of showing his innocence otherwise than by the failure of the King to demonstrate his guilt.

It was a strange and notable inconsistency in English criminal jurisprudence that would shield a prisoner as he sat isolated in the dock with the presumption of innocence, and would yet forbid him for so many centuries—except as a matter of grace—to utter a word by counsel in his own defense, or to have the assistance of counsel in marshaling his proof to make good the presumption that mocked him with the illusion that English justice was tempered with mercy. It was reserved to the vigorous Anglo-Saxon of another hemisphere to assert and maintain the invaluable right thus ignored by the Barons at Runnymede, that the citizen accused of crime should have his own advocate and counsellor to vindicate his innocence, as well in matters of fact as matters of law, and to see to it that he *should not* be taken, or imprisoned, or disseized of his liberties, or outlawed, or exiled, or in any manner destroyed, except by the judgment of his peers or the law of the land. It was within the last half century that the Act of 6 and 7 W. 4, c. 114, was enacted by the British Parliament, entitled "An Act for enabling persons indicted of felony to make their defense by counsel or attorney." The first section provides that, "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defense thereto, by counsel learned in the law, or by attornies, in courts where attornies practice as counsel." By the second section, it is further declared and enacted that, "in all cases of summary convictions, persons accused shall be admitted to make their

full answer and defense, and to have all witnesses examined and cross-examined, by counsel or attorney:" 2 Lewin's Crown Cas., 262. "At common law," said Sir William Blackstone, "it is a settled rule that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated." "A rule," he says, "which, however it may be palliated under cover of that noble declaration of the law, that the Judge shall be counsel for the prisoner, seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law:" 2 Bl. Com., 285.

But Sir Edward Coke gave a reason for the refusal of counsel: "Because the evidence to convict a prisoner should be so manifest, as it could not be contradicted:" 3 Inst., 137. Which Lord Nottingham declared, "was the only good reason that could be given for it:" 3 St. Tr., 726. While this rule of the English common law that refused the assistance of counsel in matters of fact to a prisoner indicted of treason or felony, was abrogated by statute, as to treason, in the reign of William III, yet, though greatly modified in practice, it continued to be the rule in felonies until the statute of W. 4, c. 114, already cited: 1 Chitty Cr. L., 410.

It was in view of this state of the common law in England upon this question, which was not only a reproach to the criminal jurisprudence of that country, but was in derogation of the principles of *Magna Charta* itself, and opposed to all the traditions of English liberty, that the invaluable right of a prisoner to be heard by counsel was incorporated in the fundamental law of this

country; and his right to be heard by himself, and his counsel, was engrafted upon the organic law of this State. And the question now recurs, what is the meaning of those words in the Constitution of Tennessee, that the prisoner shall have the right to be heard by himself and his counsel. Do they mean, as it is intimated at the bar that the court below interpreted them in this case, that the prisoner can only be heard as an advocate in his own behalf in the presentation of the law and the facts of his case to the jury; or do they mean that he can make such an explanation of the circumstances which have been proven against him, as he may may see proper, in order to elucidate their effect, and to solve them into consistency with the hypothesis of innocence. They certainly do not mean that he may become a sworn witness in his own behalf; for the moment he becomes a witness in the cause, he becomes, under the rules of law, subject to cross-examination, and all the usual expedients for testing the verity of his statements; and the very section which gives him the right to be heard by himself or his counsel, forbids that he be compelled to testify against himself.

By a statute of Michigan, which makes parties competent witnesses, and allowable, as well as compelable, to testify as other witnesses, it is provided, that it shall not be construed to give the right to compel a defendant in a criminal case to testify, but any such defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined on such statement. Under that statute, it was held that such defendant was not entitled to be sworn as a witness in his own behalf, but only to

make a statement to the court or jury without oath: *The People* v. *Thomas*, 9 Mich. R., 314. In that case, it was said by Campbell, J., "If we were to hold that a prisoner, offering to make a statement, must be sworn in the cause as a witness, it would be difficult to protect his constitutional rights, in spite of every caution, and would often lay innocent parties under unjust suspicion, when they were honestly silent, and embarrassed and overwhelmed by the shame of a false accusation. But, perhaps the worst evil would be the degradation of our criminal jurisprudence, by converting it into an inquisitory system, from which we have thus far been happily delivered."

The learned Judge cites the case of *Regina* v. *Malings*, 8 C. & P., 242, where the prisoner was indicted for maliciously wounding the prosecutor with intent to do him some serious bodily harm. The prosecutor and the prisoner only were present, and the prosecutor made out the case for the Queen. Baron Alderson allowed the prisoner to make a statement to the jury before his counsel addressed them, and the jury were satisfied with his explanation and found him guilty of a simple assault only. He cites, also, the case of *Regina* v. *Walking*, 8 C. & P., 243, where the prisoner, on the authority of *Regina* v. *Malings*, was permitted to read a written statement. Also, cites the case of *Regina* v. *Frost*, 1 Mod. St. Trials, 71, where the prisoner, on a charge of treason, was permitted to address the jury, but waived his right to do so. And the learned judge concludes that their could be no object in such a practice except to allow the accused to tell his own story: 9 Mich., 314.

The practice seems to have been followed in Massachusetts, when there was no statute on the subject, and was traced to the common law. In the celebrated trial of Prof. Webster for the murder of Dr. Parkman, after the close of the argument, the Chief Justice thus addressed the prisoner: "John W. Webster, before committing this cause to the jury, if you have anything to add to the arguments which have been urged on your behalf by your counsel, or anything which you may deem material to your defense by way of explaining or qualifying the evidence adduced against you, you are at liberty now to address it to the jury": Trial of Dr. Webster, 449. Upon the trial of John Frost for high treason, in 1840, after the counsel for the prisoner had concluded his argument, Lord Chief Justice Tindal thus addressed the prisoner: "John Frost, now is the proper time for you to be heard if you wish to address anything to the gentlemen of the jury beyond what your counsel have said. You will not be allowed to be heard after the Solicitor General has closed the case on the part of the prosecution": 1 Town. State Trials, 71. From which it seems that the custom of permitting the prisoner to speak for himself prevails in treason cases as it did before the Act of 6 & 7 William IV., c. 114, which act received the royal sanction in August, 1836, and took effect in October thereafter.

While it is true that, as a general rule, legislative construction of a statute is not of much weight; yet, under all the circumstances connected with the introduction of the statutes upon this subject into the Code, we are of opinion that these statutes have correctly

interpreted the right of the prisoner in this respect as indicated in the directions of the magistrate to the prisoner, as already cited, or so much thereof as admits an explanation of the facts in testimony against him, and that such was the legislative construction of the constitutional provision. And the sense of the provision is embodied in the words of the magistrate as addressed to the prisoner upon his arraignment before him: "Give any explanation you think proper of the circumstances appearing in the testimony against you." We do not think it was ever contemplated that the prisoner should be sworn or examined as a witness, or cross-examined as to what he may state, or be required to appear as his own advocate, or that it was intended to allow him to narrate facts not otherwise shown to the jury. That provision was founded upon a profound knowledge of human nature, and a close and careful observation of human transactions. An innocent person is sometimes entangled in a web of suspicion by a curious combination of facts, which no one else can explain but himself. These facts unexplained may point unerringly to the prisoner as the guilty person. The skill or eloquence of his counsel can not reconcile the facts proven with the hypothesis of innocence. He alone may be possessed of the clue. He alone may be able by a simple explanation of circumstances which now seem inexplicable otherwise than upon the assumption of his guilt, or by putting this and that fact together, to remove every shadow of suspicion from himself. This may be a perilous adventure for the guilty man, but the jury are to be the judges of the truth, and they

will not fail to distinguish between the cunning version of guilt and the ingenuous explanation of innocence.

We are of opinion that the prisoner in all criminal prosecutions, after the testimony has been heard for and against him, has a right to be heard in an argument in his own behalf and as his own advocate; or in an explanation of the circumstances which have been testified against him. That it is error to deny him this right. That in such case he is not to be sworn or cross-examined as a witness; but that a jury may consider a clear, consistent refutation of guilt to be deduced from an argument which explains, to their satisfaction, the circumstances of suspicion by which the prisoner was before complicated; or, they may pay no attention to it whatever. It is not testimony, in its legal sense, but the logic of facts; which, operating upon a mind in quest of the truth, induces an honest conviction that the cloud of guilt which had been generated by the evidence in the cause, has been dissipated and removed by the explanation of the prisoner. If he wishes to submit an argument upon the case, he has a right to do so; or, if he would simply explain the facts already in testimony, then he may do so. In other words, the Constitution guarantees to every prisoner the right to explain the case made against him, in his own way. He may waive the right, if he chooses, but no court can deprive him of it. If he demands it, the court should at once instruct him that he may make an argument or an explanation of the circumstances proved against him, but that he can state no facts not already shown to the jury.

Charles Wilson *v.* The State.

It appears in the bill of exceptions, that the prisoner was in the employment of the prosecutor. The latter returning home after an absence of a few hours, found that some one had taken off some of his goods. The prisoner having left the premises during the prosecutor's absence, was at once suspected as the thief. He was pursued and arrested, and the goods found upon his person. The prisoner admitted to the prosecutor, a short time after his arrest, that he had taken the goods, and produced and handed to the prosecutor a bureau key, which he said "caused him to take the goods." He had, during the absence of the prosecutor, it seems, obtained possession of the key, with which, he said, he unlocked the bureau and abstracted the goods, intending to make sale of them. The testimony of the prosecutor as to this statement, was objected to, as evidence of a confession obtained by improper influence. It is alleged, that the prisoner was terrified by the threatening conduct of the prosecutor, and, under the influence of that terror, made the confession. We do not agree with the prisoner's counsel in this respect, and hold that the court committed no error in admitting the testimony. When, upon an indictment for crime of any grade, the *corpus delicti* has been clearly established, a deliberate confession of guilt, uninfluenced by the hope of impunity or reward, or the fear of punishment in any manner or degree, is regarded as a most effective proof in the law; yet it is a species of evidence which is to be received with the greatest caution; or, as said by this court, "with great distrust and under very solicitous apprehensions for the wrong it may do:" *State* v. *Fields*, Peck's R., 140; *Mc-*

Glothlin v. *State*, 2 Cold., 223; *Whitesides* v. *State*, 4 Cold., 175; *Deathridge* v. *State*, 1 Sneed, 75. And when confessions once made under fear or hope, are repeated, it is presumed that a subsequent confession is made under the same influences; and the burthen is upon the prosecutor to show that this is not so: *Deathridge* v. *State*, 1 Sneed, 75; *State* v. *Roberts*, 1 Dev., 259; et. vid., *State* v. *Gregory*, 5 Jones, (N. C.,) 315; *State* v. *Scates*, 5 *Id.*, 420. And it is held, that if there be a doubt as to the legality of the manner of obtaining a confession of guilt, and there be other evidence ample to support the conviction, there will be no reversal on account of the confession: *Simpson* v. *State*, 4 Hum., 456. It was held, in the case of *The State* v. *Moon*, 1 Hay., 582, that a confession extorted and uncorroborated by circumstances, weighs nothing; but a confession, whether extorted or not, that relates circumstances with which the prisoner could not well be acquainted but as the perpetrator of the crime, and which circumstances are proved by other witnesses to have actually existed, is testimony proper to be left to the jury: 1 Hay., 582.

When the prosecutor pursued the prisoner on the day of the alleged theft, he overtook him walking along the road in the direction of Memphis. The prisoner had in his possession the prosecutor's gun, and the other lost goods also. As the prosecutor approached him, he, the prosecutor, being also armed with a gun, drew it upon the prisoner and commanded him to halt, which the prisoner did. In a moment thereafter, the brother of the prosecutor also rode up, and he too being armed with a gun, observed to the prisoner that the prosecu-

tor ought to have shot him. The prisoner was then arrested, and was told by the prosecutor that no harm should be done him. The prosecutor also told him he should not be harmed, at the moment the brother of the prosecutor made the remark referred to. The prosecutor states positively, that he did not otherwise threaten the prisoner, than by drawing the gun upon him in order to make him halt; and that at no time was he threatened by him or any other person; and that no inducements whatever were held out to him in order to obtain a confession; but that, after the party had, upon their return, traveled about two and a half miles, the prisoner voluntarily made the statement referred to.

We do not think that this confession falls within the rule; and we hold that his Honor, the Judge of the Criminal Court, committed no error in admitting the testimony.

The judgment will be affirmed, and the prisoner will be recommitted.

FREEMAN, J., delivered the following opinion:

While I agree in the judgment of the Court in this case, and think the judgment of the Circuit Court should be affirmed, I regret I can not assent to the opinion of my brother, Sneed, for reasons which I think proper to present.

1st. I think no opinion or argument of this court is necessary to maintain or assert the constitutional guaranty, that in all criminal prosecutions the accused hath a right to be heard by himself and his counsel. This right has

never, to my knowledge, been denied to any one accused of crime, in any court of this State.

2nd. We expressly hold that it was not denied in this case, by affirming the correctness of the action of the court.

3rd. I think the opinion of my brother, Sneed, is calculated to mislead, as the propositions asserted in the argument, and the general current of the reasoning, would lead to the opposite result from that which is given in its conclusion as the judgment of the court.

4th. I hold that the clause in the Constitution, that a prisoner may be *heard* in his own defense in all criminal prosecutions, and may also be heard by his counsel, means simply that such counsel shall make such argument in his defense, against the prosecution, as may be warranted by the law and the facts of the case; and that, being heard by himself, means precisely the same thing, no more, no less. That this privilege can not mean, what would be understood by, "making an unsworn statement," in regard to the charge for which he stood indicted. That this proposition would naturally mean to give a narrative of facts in reference to the charge, and not an argument on the facts already in proof. If his application only meant a statement of the facts already proven, then it would be unnecessary and improper, as this is to be done by witnesses sworn, and subject to cross-examination. If it meant that he was to be permitted to do more than this, and he was to state other facts not in proof, or make any narrative or statement of facts in reference to the charge against him, then it was not the priv-

ilege given by the Constitution; unless we should hold that counsel may be permitted to make an unsworn statement of facts to the jury, for the same hearing is given him by counsel, under the Constitution, that is given by himself.

The fact that the provision of our Constitution grew out of a denial, by the Law of England, of the right on the part of a prisoner in criminal prosecutions, to be defended in an argument upon the facts of the case, before the jury, clearly points to the true meaning of this provision; that is, that he shall have this right in this State, and shall also continue to have the right, which the prisoner had in England, of being heard by himself—that is, of arguing his own case. In other words, that he shall have the privilege of being defended in an argument before the jury, by counsel, in addition to the common law privilege of defending himself. If it had simply been said he should be heard by counsel, then it might have been held he could not be heard by himself as well, and therefore both rights are given in express terms.

If it had been simply said in the Constitution that he should be heard by counsel, then it would never have been claimed that such hearing involved the right to make an unsworn statement of facts to the jury, but all would at once have agreed that he was to be heard in his defense by counsel in the ordinary way—not in the way of statement, but of argument on the law and facts of the case. If this be correct, it must be equally clear, that the same character of hearing is

to be had by himself, as there is no difference in the character of the hearing made in the Constitution.

If the opinion of my learned brother means only this, then the Constitution is too clear on the question for exposition or construction. If it means anything beyond this, then I think it is not the law or true exposition of the Constitution.

For these reasons, I deem it my duty to express my opinion in this case, and to indicate what I think the true construction of the constitutional provision in question.

I agree that there is no error in the action of the court below, and that the judgment should be affirmed.

NELSON, J., dissenting, delivered the following opinion:

The refusal of the Circuit Court to allow the plaintiff in error, upon his trial, to make "an unsworn statement in regard to the charge," was, in my opinion, a violation of that clause in the Bill of Rights which declares that, "in all criminal prosecutions, the accused hath a right to be heard by himself and counsel." The object of this provision was to mitigate the severity, and to correct the tyranny of the English trial by jury in criminal cases. At one time, in the history of that country, prisoners were not even permitted to introduce witnesses in their defense. With the exception of cases of treason, and in misdemeanors, they were not allowed to appear, by counsel, in criminal cases, until the 6 and 7 Will. 4, c. 114, enacted in 1836: Story on Const., § 1793.

But, for a long period, the practice in England was to allow the prisoner to address the jury. In 1 Chit. Cr. Law, Riley's ed., 509, it is said that: "When the case and evidence of the prosecution is concluded, the judge calls on the defendant for his defense, usually saying, 'Well, prisoner, what have you to offer in your defense?' The prisoner is then, and before the examination of his own witnesses, entitled to address the jury, whose duty, as well as that of the court, it is, to attend with patience to what he may think fit to offer." It was not the intention of the framers of the Constitution to abridge the right. Undoubtedly, it was their purpose to enlarge it. He had the right to address the jury under the English practice. The Constitution conferred the right of being heard by himself and his counsel. Who, within the spirit of that instrument, may presume to prescribe what he shall say, or whether he shall be heard in statement or in argument? In harmony with this provision, the court, under its general powers, may restrict his statement, or argument, to the case under consideration, but who can say, imperiously, to a jury, what effect the statement, or argument, is to have, or to what extent his being heard shall benefit or prejudice him? What does hearing mean, if it does not mean that the court and jury are to listen to what the prisoner has to say? He has the right to be heard, if he chooses to risk the hazard of exercising it; and the jury must give much or little, or no weight, to his statements, in view of all the evidence and surrounding circumstances. For obvious reasons, this right has, seldom, been exercised, as most prisoners know that it is far the safest plan to entrust

their defense to counsel; but it should not be denied, if claimed or insisted upon.

Long before the adoption of any of our constitutions, it was customary in North Carolina, our parent State, for the Magistrate to examine the prisoner; although it is believed such examination never was compulsory. By the Act of 1715, c. 16, s. 1, it was provided that, "no person within this State shall be committed to prison for any criminal matter, until examination thereof be first had before some Magistrate, which Magistrate shall admit the party to bail, if bailable, and shall record the examination of the party, and also the full matter given in evidence, both against him and for him, with all concurring circumstances," etc.: Car. & Nich., 426. These provisions were carried into, and more carefully defined by, the Code, pp. 900, 901, Art. III. There is no difference, in principle, between the examination, or statement, of the prisoner before a Magistrate, and his statement, or examination, in court; and it is manifest that the reason why there was no legislation in North Carolina, or Tennessee, on the subject up to the time of the adoption of our first Constitution, was, that the prisoner had the right, whether the prosecution was commenced before a Justice, or in Court, to make his statement and to address the jury, at common law, and no legislation was necessary to regulate it: See Cooley's Const. Lim., 316. His right to have counsel was secured, before the adoption of our first State Constitution, by the North Carolina Act of 1791, c. 1, s. 71, Car. & Nich., 240, which was adopted about the time of the adoption of the sixth, with other amendments of the National Constitution.

But our State Constitution is broader and more comprehensive than that of the United States, or the North Carolina statute, as it secures to the prisoner the two-fold right of being heard by himself and his counsel. The true meaning of this provision is, that the prisoner may make his statement as to the facts, and that his counsel may argue all questions of law and fact arising in his case. This conclusion is, perhaps, aided by the analogy to be drawn from the English practice, which is thus stated: "The rule by which counsel are refused to the defendant, applies only to *matters of fact;* for, whenever a point of law arises proper to be debated, he will have counsel to discuss it, as whether the facts proved constitute any offense, or the offense charged; whether the witnesses offered are competent; whether the jury are sufficient, and whether the indictment is properly framed. In these cases, it is said, the prisoner must propose the point, and the court will assign him counsel, if they think it will bear discussion:" 1 Chit. Crim. Law, 407, 408, marg.

CHARLES LINK *v.* THE STATE.

1. PRACTICE. *Trial without plea. New trial.* Where there is a trial without a plea of not guilty, the court may, on the motion of the prisoner to arrest the judgment, set aside the verdict and order a new trial.
2. FORMER CONVICTION. In such case the record will not support a plea of former conviction.
3. PRACTICE. *Prisoner standing mute, entitled to panel and challenges.* Where, in such case, the facts were submitted to the court and determined not to support the plea, and the prisoner being ordered to plead over, on his arraignment stood mute, and the court ordered the plea of *not guilty* to be entered, held that the prisoner was entitled to the usual panel and challenges, and the court could not order the traverse jury to be sworn to try his case, against the consent of the prisoner.

Code cited: 5209, 5212, 5214.

FROM SHELBY.

Criminal Court, January Term, 1871. Before JOHN R. FLIPPIN, J.

WALKER & HORRIGAN, for the prisoner, insisted that the conduct of the prisoner on the first trial, taking part in the selection of the jury and making challenges, was an authority to the court to enter the plea of not guilty: *Hensche* v. *The People*, 16 Mich., 46; cited *People* v. *Frost*, 5 Parker's Cr. R., 52, as to purpose of arraignment; Code, 5242. If the plea was properly overruled, then the defendant is properly entitled to a new trial, on the refusal to present a panel and to allow the usual challenges: Code, 5212, 5213.

Attorney General HEISKELL, for the State, insisted

that, if it was error for the court below to order a new trial, then, the court ought to have entered judgment on the first verdict, and as he had failed to do so, this court, as a court of errors, ought now to enter the judgment which, upon the whole record, the court below ought to have entered.

DEADERICK, J., delivered the opinion of the Court.

At the January Term, 1870, of the Criminal Court of Shelby county, a verdict was rendered against the plaintiff in error, upon an indictment for horse stealing, fixing the time of his imprisonment in the penitentiary at five years.

A motion in arrest of judgment was made by plaintiff in error, and the same was overruled by the court, and an order made by the court setting aside the verdict and awarding a new trial, without any application therefor by plaintiff in error.

Subsequently, the plaintiff in error, being arraigned at the bar for trial, pleaded the former conviction as a bar to any further or other prosecution, upon the same indictment.

But, it appearing to the court that there was no issue made, or submitted to the jury to try, between the State and the plaintiff in error, which facts were replied to by the Attorney General in behalf of the State, and by agreement submitted to the court for determination, the plea of former conviction was disallowed and overruled.

The record then recites: "Comes the Attorney General on the part of the State, and the said defendant

in proper person, who, on being arraigned at the bar of the court and charged on the above bill of indictment, stands mute, and refuses to plead; whereupon the court orders a plea of not guilty to be entered herein."

Whereupon, a jury was empaneled to try said issue.

But it further appears from the record, that the traverse jury was called into the jury box, and offered to be passed to the defendant, who objected that they were not elected or presented for his acceptance in the usual and legal mode in such cases, and objected to making any selection until the jurors were presented to him in accordance with the law of the State. The court overruled the objection of the defendant, and ordered the elerk to swear the jury to try the issue upon the plea of not guilty, which was accordingly done.

Evidence was adduced and a verdict of guilty rendered, and the term of imprisonment in the penitentiary, fixed at ten years.

A new trial and motion in arrest of judgment being refused and overruled, the defendant appealed in error to this court.

It clearly appears from the record, that the defendant, upon his first so-called trial, did not put in a plea of not guilty, or other plea. The verdict of the jury, not being responsive to any issue, was a nullity, and the defendant can not be said to have been in jeopardy, and there was no error in setting aside that verdict of guilty, and granting the prisoner a new trial.

If a plea of not guilty, or other sufficient plea, had been in fact pleaded, although by inadvertence, or from

other cause, the clerk had omitted to file or enter such plea of record, a judgment, upon a finding by the jury upon such plea, would have been valid: Code, 5242.

And under this section of the Code, this court would, perhaps, be authorized to presume that the plea of not guilty was in fact pleaded, unless the record showed facts upon its face contradicting such presumption.

There was, therefore, nothing in the first verdict of the jury to prevent the court from putting the defendant upon trial.

The defendant standing mute, and refusing to plead, the court had the right to enter the plea of not guilty, and procced with the trial: Code, 5209.

But, in what manner should the trial proceed? The section of the Code last cited, provides that the trial shall proceed after the plea of not guilty is entered by the court, in the same way as if the plea had been entered by the defendant himself.

The defendant was entitled to have a list of the jurors furnished him a reasonable time before the formation of the jury commenced. He was entitled to have the name of each juror summoned, written on separate scrolls, and placed in a box or other receptacle, and drawn as provided by statute, subject to the peremptory challenges and challenges for cause, which the law secured him: Code, 5212, 5214.

These rights, secured to every defendant in a State prosecution, and of which he could only be deprived by his waiver of them, or refusal to avail himself of them when offered, were denied the defendant against his pro-

test, in empaneling the jury, by which he was tried. And for this error, the judgment of the court below must be reversed, and the cause be remanded for a new trial.

WRIGHT *v.* THE STATE.

COUNSEL FEES. *Counsel Assigned.* Counsel assigned to defend a prisoner who is unable to employ counsel, is entitled to no compensation from the State or county.

FROM SHELBY.

Criminal Court. Before JOHN R. FLIPPIN, J.

Counsel being assigned to defend the prisoner on his trial below, moved for an order that he be allowed a reasonable compensation for his services. Allowed.

HORRIGAN here insisted that the State had no right to demand service without compensation.

SNEED, J., delivered the opinion of the court that no compensation was allowable. Order reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

KNOXVILLE,.....SEPTEMBER TERM, 1871.

HANKINS DANIEL *v.* THE STATE.

INDICTMENT OR PRESENTMENT. *Must state facts, not conclusions of law.* A presentment charging that the defendant did wilfully, &c., assume to be a Justice of the Peace, and did take upon himself to act as such, not being a *"legal qualified"* Justice of the Peace, without showing wherein his want of legal qualification consists, is bad.

Case cited and approved: *Pearce* v. *State*, 1 Sneed, 67.

FROM MEIGS.

Circuit Court, June Term, 1871. JOHN B. HOYLE, J., presiding.

W. L. HARBISON, for plaintiff in error, insisted that the presentment did not charge any offense against the laws of this State. That it was insufficient for not showing how the defendant was deficient in legal quali-

fications, whether by reason of his being a non-resident of the county or State or district, or for some other reason, and so it did not sufficiently put him on notice of what he had to defend, and cited *Pearce* v. *State*, 1 Sneed, 67.

Attorney General HEISKELL, for the State.

FREEMAN, J., delivered the opinion of the Court.

This is a presentment, charging that, "Hankins Daniel, on the 10th day of September, 1870, in Meigs county, did wilfully, unlawfully and falsely assume to be a Justice of the Peace, and did take upon himself to act as such," and then alleging that on that day he tried a party for a misdemeanor, "he not being at said time, a *legal qualified* Justice of the Peace, &c."

A motion was made to quash the presentment, which was overruled by the Court, and the defendant convicted. Reasons in arrest of judgment were then filed, and overruled; the defendant filed the record in this court, and now prosecutes a writ of error for reversal of the judgment.

The presentment is in the language of the statute, and the only question is, whether, under the Constitution of Tennessee, Art. 1, Sec. 9, the charge is sufficient. That provision is, "That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, *to demand the nature and cause of the* accusation against him, and to have a copy thereof."

The object of this provision is unmistakable and clear, that a party accused should know from the state-

ments and allegations of the indictment or presentment against him, not only the charge against, or accusation, but its nature and cause. It is intended to give him notice of the facts sought to be proved against him in order to his conviction; and for this purpose he is entitled to have a copy of the accusation.

In the case of *Pearce* v. *The State*, 1 Sneed, 67, the presentment was in the language of the statute, and charged the defendant with "unlawfully and knowingly voting in the county of Rhea, not being a qualified voter in said county." The Court say: "The presentment is in the language of the statute;" but that the charge was simply of a legal result, and for the facts which constituted him a qualified voter we are to refer to the Constitution and laws, "from which it will be seen that there are several grounds of disqualification," going on to mention them. "Now," the court say, "for which of these causes was the defendant disqualified? The presentment does not inform him, and the cause can only appear in the proof, when he may be taken by surprise, and be wholly unprepared to make his defense, however just and valid it may be."

There are at least four cases of disqualification from holding office in our State, so that the above case is conclusive of this one; unless we should overrule it, which we do not feel that we ought to do. We have examined this record containing the presentment, trial and conviction, with the proceedings had therein, but as there is no bill of exceptions containing the proof in it, we are totally at a loss to surmise what was the "nature and cause of the accusation" of which the

party stands convicted. We, therefore, can not hold that the presentment gave the defendant notice of the offense with which he stood charged, with sufficient certainty to enable him to make his defense to it understandingly.

The case will be reversed and the judgment arrested, and the presentment quashed.

NOAH DILLARD *v.* THE STATE.

1. INDICTMENT. *Feloniously. Equivalent words.* A charge in an indictment, that the act was done "with intent to commit felony," is equivalent to a charge that it was done "feloniously."

2. SAME. *Same. Assault to commit Rape.* An indictment for assault, with intent to ravish, which charges the assault to have been made with intent to commit a felony, instead of charging that the defendant feloniously made an assault, is good.[1]

FROM M'MINN.

Circuit Court, August Term, 1871.

————————,[2] for the prisoner, cited: *Williams* v. *The State,* 8 Hum., 585; *Neville* v. *The State,* 7 Hum., 78.

Attorney General HEISKELL, for the State, cited Peek's case, 2 Hum., 78; and Perdue's case, *Ib.*, 494; and the Code, 5114, 5115, 5119, 5120. Of these, 5115 dispenses

[1]See *Jones* v. *The State,* Nashv., 1872. [2]Brief not signed.

with all "words not essential to constitute the offense;" and insisted that the words necessary to constitute the offense were those chosen by the Legislature to define it.

TURNEY, J., delivered the opinion of the Court.

An indictment in the language, "And the jurors aforesaid, upon their oaths aforesaid, do further present, that Noah Dillard, on the day and year aforesaid, did assault Susan Brady, with intent to commit a felony, and did then and there, forcibly and feloniously, and against her will, attempt to have unlawful carnal knowledge of her, against the peace and dignity of the State," is good.

The objection urged, is, that the indictment should have charged, that the prisoner "feloniously did make an assault," etc.

Conceding, for the purposes of this case, that such averment is necessary, we understand it to be distinctly made in the indictment before us, substantially, as insisted it should have been. The word feloniously means, "with intent to commit a felony." The charge that a party made an assault, with intent to commit a felony, is a charge that he feloniously assaulted.

To use the language of the indictment, a slight transposition makes the averment, "Noah Dillard did, with intent to commit a felony, assault Susan Brady," etc. So, if it be necessary under the statute, that the abstract assault shall be defined to have been made feloniously, we have such definition here, and it can make no difference whether the definitional term employed is an adverb or noun. The objection is artificial, rather than substantial.

Affirm the judgment.

THE STATE *v.* WM. F. MORGAN.

Under the Code, 4633, an indictment is sufficient which charges that the defendant did maliciously threaten O. G. M. B. that he should suffer the consequences; (meaning that he would kill him, or do him some great bodily harm, then and there pursuing him with a pistol,) unless the said O. G. M. B., against his will, should leave Smith's X Roads, with intent, &c.

FROM RHEA.

Circuit Court, July Term, 1866. The record does not show what Judge presided.

R. M. EDWARDS, for the prisoner, insisted that a threat that prosecutor "should suffer the consequences," is too vague, and can not be supplied by inference. No threat charged to do any specific injury.

Attorney General HEISKELL, for the State, said: It is objected that the threat is vague; 1st, that prosecutor should take the consequences. A defendant can not evade the law by a refusal to *state* in full what he means, if he *conveys the idea* to the mind of the person threatened. The enigmatical character of a threat leaves matter to be supplied by averment, showing the meaning of the words used. If he said these words in the sense averred, then it is the same as if he had used other words clearly conveying the idea. The indictment avers that he used these words in that sense. It gives notice, therefore, of what the proof is to be. But a fact is stated in explanation: that he was then pursuing the prosecutor with a pistol. This is the overt act by which we expect to

prove what consequences are intended. Language is not the only means of conveying an idea. Signs and gestures express ideas, or come in aid of language for that purpose. A deaf and dumb man may threaten in his sign-language, and such threat may be as significant, and therefore as criminal, as if audibly uttered. Here are words, to which acts of the most significant character come in by way of supplement; and these are stated in the indictment in a mode entirely capable of being understood "*in ordinary language*," and the averment is good. The history of the law of slander illustrates the rule on this subject; and the struggle between sense and folly, between the *mitiori sensu* and what the person meant, is a warning and an experience. To hold that no threat is criminal, unless every word necessary to convey the idea is actually uttered, is to hold that the law is a farce.

2d. The injury is not charged. The threat is, that he should suffer the consequences; that something would follow. What did he mean would follow? The indictment says he meant death or some great bodily harm. How else is the charge to be made, if not by charging what he said, and then what he meant? If the charge was, that he *said* he would kill him, when he did *not say* that, the proof would fail. If the *offense* is complete, a *description* of that offense which describes it as it is, is a good description.

FREEMAN, J., delivered the opinion of the Court.

The indictment in this case was quashed by the court below, and an appeal to this court. It charged that Wm.

F. Morgan, (the son of Wash. Morgan,) on the 8th day of September, 1865, in Rhea county, did maliciously threaten O. G. M. Broyles, that he should suffer the consequences, (meaning that he would kill him, or do him great bodily harm, then and there pursuing him, the said Broyles, with a pistol,) unless the said Broyles, against his will, should leave Smith's Cross Roads immediately; with intent thereby to compel the said Broyles to leave Smith's Cross Roads against his will, from fear of injury to his person, so menaced and threatened by the said Morgan."

The section of the Code under which this indictment is drawn, is 4633: "If any person, either verbally or by written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent thereby to extort any money, property or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall, on conviction, be punished by imprisonment in the penitentiary, not less than two, nor more than five years."

We hold, this indictment charges an indictable offense under this statute. It charges the party with maliciously threatening Broyles, that he should suffer the consequences, and then by way of explanation of the meaning of these words, charges, that he meant thereby to kill him, or do him some great bodily harm, then and there pursuing him with a pistol. These last words may be rejected as surplusage, as the other explanatory words serve to show the meaning of the threat; and this fact of pursuing him with a pistol serves only to show that

the party had the means of carrying his threat into execution. They would be competent in proof to show what was the probable meaning of the party; and also to show the character of intimidation intended by the party by his threat.

The statute is a highly penal one, and we deem it proper to say, was not intended to apply to every idle threat, but such as are evidence of serious purpose to do the injury threatened, and that, some serious injury, such as is alleged in this indictment. Nor would it apply to a threat to compel a man to do any minor act,[1] of no great injury, or serious importance; but only such serious threats of injury as should be used to compel a party to do some act materially and seriously affecting his interest—as is shown by the enumerated cases—to extort money, property or pecuniary advantage. But we hold, that a serious and malicious threat, intended to compel a party to leave the place of his residence, on pain of death, or great bodily harm, is an attempt, by threats, to compel a man to do such an act against his will, as was intended to be prohibited by the statute, and therefore, the court erred in quashing the indictment.

The case will be reversed and remanded.

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[1]The words of the statute are, "to compel the person threatened to do *any* act."

James and Mollie Robeson *v.* The State.

1. Indictment. *Alternative averments.* An indictment or presentment, under the act of 1870, c. 39, for cohabitation of a white person with a negro, charging in the alternative, that J. R. was a negro, mulatto, *or* person of mixed blood, to the third generation inclusive," is bad.
2. Grand Jury. *Power to send for witnesses.* The act of 1869-70, c. 51, § 1, allowing grand jurors to send for witnesses in cases of lewdness, does not extend to offenses under the subsequent act of 1870, c. 39.
3. Indictment. *Cohabitation need not be charged to be knowingly.* The act of 1870, c. 39, s. 1, prohibits the intermarriage, &c., of whites and negroes. The 2d section declares, that "knowingly" to violate these provisions, is felony. Held that an indictment need not charge the act to be "knowingly" done.
4. County Court of Hamilton. *Criminal jurisdiction.* The act of 1870-71, c. 82, s. 1, giving criminal jurisdiction to the County Court of Hamilton county, of all offenses under the grade of grand larceny, confers such jurisdiction in all cases where the limit of punishment is lower than in grand larceny. The grade is to be determined from the amount of punishment affixed.

FROM HAMILTON.

County Court. A. G. W. Puckett, J., presiding

Trewhitt & Sharp, for the prisoners, insisted that the indictment was for a misdemeanor simply. If otherwise, the grand jury had no power to find the presentment; and the plea in abatement, that it was found upon the information of witnesses, was good: 4 Cold., 199; 1 Hum., 59; Meigs, 192. The presentment is defective, for not averring knowledge by each of the *status* of the other, knowledge being the gist of the

offense. That the County Court of Hamilton had no jurisdiction of any offense, where the *maximum* of imprisonment would reach beyond the *minimum* in grand larceny, if indeed it had jurisdiction of any felony but petit larceny.

J. J. McGLOHAN, on the same side, cited, upon the power of the grand jury to send for witnesses, 4 Cold., 195; *State* v. *Love*, 4 Hum., 255; 5 Cold., 26.

Attorney General HEISKELL, for the State.

TURNEY, J., delivered the opinion of the Court.

An indictment or presentment, under the act of Assembly of June 29th, 1870, (Shankland's Statutes, p. 602,) in the descriptive words: "James Robeson, being a negro, mulatto, or person of mixed blood to the third generation inclusive," is bad. This one paragraph in one count, embraces three offenses in the alternative, which may be contained in as many counts of one presentment or indictment, being of the same nature and visited by like punishment; but, under well established rules of law, lately re-announced by this court, can not be sustained, all being embraced in one count. The motion to quash, should have set forth the grounds for the motion. Such only is the proper practice; but for reasons suggested and justified by the record, we do not feel bound by the rule in this case; and hold, the motion should have been sustained, and the presentment quashed.

By § 5087 of the Code, it is provided: "The grand jury shall send for witnesses, whenever they or any of

them, suspect a violation of the laws against, 1, Gaming; 2, Taking tolls at turnpike or toll bridge gate, opened according to law; 3, Illegal voting; 4, Tippling; 5, Disturbing public worship; 6, Injuries to public buildings." The law amendatory of this statute, and conferring further inquisitorial powers upon the grand jury, does not embrace the offense of which we are inquiring. The conference of the power and authority upon the grand jury to send for witnesses, in the matters distinctly designated by the law, means to confine it to the exercise expressed, and by implication exclude the right in all other cases.

To a presentment for an offense, not embraced in the law last quoted and referred to, found upon testimony other than that of the knowledge and communication of a member of the grand jury, a plea in abatement is a proper defense, and a demurrer thereto should be overruled.

The word "knowingly," used in section 2, act of June, 1870, is not necessary to the indictment, it being there employed in reference to proof.

The act giving criminal jurisdiction to the County Court of Hamilton county, declares, it "shall have jurisdiction of all criminal offenses under the grade of grand larceny." The objection, that the offense charged is not under the grade of grand larceny, and therefore the court has no jurisdiction, is not well taken. The grade of the offense is to be ascertained from the law declaring it and affixing the punishment. In grand larceny, the punishment is confinement in the penitentiary not less than three nor more than ten years. The

offense here charged, is imprisonment for not less than one nor more than five years; exactly the grade and punishment of petit larceny. Besides, the *minimum* and the *maximum* of punishment of the offense here charged, are lower than those of grand larceny.

The judgment of the County Court is reversed, and the presentment quashed; but, as the record presents the fact that an indictable offense has been committed, the plaintiffs in error will be returned to the sheriff of Hamilton county, that the court, if it deems right, may order indictments, as provided by § 5093, Sub-div. 9, of the Code.

FRANK WARREN, WM. ROGERS AND JASPER RAINS *v.* THE STATE.

INDICTMENT. *Disturbing public worship.* An indictment or presentment under the Code, 4853, for disturbing public worship, need not aver that the act was done "*at or near*" the place of worship.

Case overruled: *The State* v. *Doty*, 5 Cold., 34.

FROM HAMILTON.

Circuit Court, July Term, 1871. JOHN B. HOYL, J., presiding.

The record showed that "the defendant, by attorney,

filed the following reasons in arrest of judgment, to wit: 1st. The presentment does not charge that the whispering, laughing, talking, and other acts of rude and indecent behavior, were done *at or near* the place of worship;" and that the same were overruled, &c.

M. H. CLIFT, for plaintiff in error, cited *State* v. *Doty*, 5 Cold., 34.

Attorney General HEISKELL, for the State, insisted that Doty's case was decided upon the idea that the words "at or near," were restrictive in their character, when, in fact, they were intended to enlarge the operation of the act, and make it apply, whether the act was done at the place, or only near it.

DEADERICK, J., delivered the opinion of the Court.

At the March Term, 1871, of the Circuit Court of Hamilton county, the plaintiffs in error were presented for disturbing religious worship. They were convicted at the July Term, 1871, of the court, and motions for a new trial, and in arrest of judgment, were severally made and overruled, and they appealed in error to this court.

It is insisted that the judgment and verdict should be set aside, as they are not sustained by the evidence.

While it is true that there is some apparent conflict in the testimony, there is evidence sufficient to sustain the verdict, and the jury had the opportunity of judging of the credibility of the witnesses introduced before them, and the Circuit Judge before whom the trial was had, refused to grant a new trial, and we can not say that we are not satisfied with his action.

Frank Warren, Wm. Rogers and Jasper Rains *v.* The State.

The reason in arrest of judgment, is, that the presentment does not charge that the whispering, laughing, talking, and other acts of rude and indecent behavior, were done at or near the place of worship.

The act on which the presentment is founded, provides, that if any person willfully disturbs or disquiets any assemblage of persons met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of worship, he shall be fined, &c.: Code, 4853.

In the case of *The State* v. *Doty*, 5 Cold, 33, this court held, that it was indispensable to aver that the acts causing the disturbance were done at or near the place of worship, upon the ground that it is of the essence of the offense that the acts should be done at or near the place of worship.

We entertain a different opinion of the proper construction of the statute. The willful disturbance, by rude or indecent behavior, &c., of persons met for religious worship, is the offense made punishable by statute. It is true that the offense can be committed only by persons who are at or near the place of worship, and the purpose of the words "at or near," in the statute, is to provide for the punishment of cases of disturbance by an offender who may be near the scene of disturbance, as well as those committed in the very presence of the assembled worshippers. In what precise locality the offender may be, is not an essential element of the offense, and it may be shown by proof, and need not be averred in the presentment.

This court has uniformly given a liberal construction

to statutes enacted for the protection of religious assemblies, against disturbances by disorderly persons.

The case in 5 Cold. is, therefore, overruled, and the judgment of the court below is affirmed, and the cause is remanded for the execution of the judgment.

THE STATE *v.* WM. R. DAIL AND OTHERS.

COSTS. *Motion. Delinquent Tax-Collector.* A delinquent revenue officer who pays over moneys after notice of a motion against him, is liable to the costs of the motion, though made after the date of the payment.

FROM ANDERSON.

Circuit Court, March Term, 1871, E. T. HALL, presiding.

There was no evidence, of notice of the payment to the District Attorney, before the motion was entered, or of tender of the costs of the notice.

Attorney General HEISKELL, for the State.

L. C. HOUK and R. B. DOWELL, for the defendants.

SNEED, J., delivered the opinion of the Court.

The collector of the public revenue, who is in default in the discharge of his duties, and whose default has

made it necessary for a motion to be made against him in behalf of the State, can not be excused from the payment of the costs of said motion by showing that between the service of the notice and the hearing of the motion, he has made his settlement and received his acquittance from the Comptroller. The service of the notice in such case, from the Attorney General, must be considered in the nature of the service of a leading process and the beginning of a suit, and not a private paper, as it would be, as between individuals: *vide* 11 Hum., 304. The proceeding has been rendered necessary by the officer's delinquency; and his default is confessed by the payment made after the notice. The liability to the motion accrued the moment of the default; and if the proper officer has instituted the appropriate proceeding for its enforcement, the costs must follow. In this case, the defendant was in default, and after notice, and before the motion, he paid over the amount. In such case, the State was entitled to a judgment for full costs.

The judgment of the court below will be reversed, and judgment will be entered here for the costs against the defendants.

THE STATE *v.* THOMAS LOCKETT.

INDICTMENT. *How signed by Attorney General.* The official signature of the District Attorney General, to an indorsement on an indictment directing what witnesses shall be summoned, does not cure the want of a signature to the indictment itself.

Cases cited: *Fout* v. *State*, 3 Hay., 28; *Hite* v. *State*, 9 Yer., 202; *Teas* v. *State*, 7 Hum., 174; *Staggs* v. *State*, 3 Hum., 373.

FROM KNOX.

Criminal Court, May Term, 1871. Indictment quashed. M. L. HALL, J., presiding.

Attorney General HEISKELL, for the State, insisted that, as the only purpose of the signature was to show that the indictment had the sanction of the law officer of the State, that was shown as well by his directing witnesses to be summoned, as by submitting it to the Grand Jury, with his signature.

J. F. J. LEWIS cited *Teas* v. *The State*, 7 Hum., 174, and insisted that the signature to the direction as to witnesses is in obedience to a statutory direction: Code, 5596, 5597, and intended for a purpose different from the authentication of the indictment.

SNEED, J., delivered the opinion of the Court.

An indictment not authenticated by the official signature of the Attorney General, is a nullity. It is not essential that the signature of the officer should be

placed at the end of the indictment. It is sufficient if it appear on some other part of the paper, provided it appear beyond doubt that the attestation relates to the indictment and every part thereof, and identifies the same as the act and accusation of the government, done through its sworn officer. The object of the signature is to give dignity and verity to the paper, as a public act, having the sanction of the government. In the case of *Fout* v. *The State*, 3 Hay., 28, it was determined that no bill of indictment should be sent to the grand jury without the sanction and approbation of the Attorney General proved by his signature on some part of the indictment. In the case of *Hite* v. *The State*, 9 Yer., 202, Judge Turley says: We not only admit the authority of the case of *Fout* v. *The State*, but concur in the opinion."

We do not say it is absolutely necessary that the signature should be at the conclusion of the bill; but it must be on it, and must show that it is intended to cover all the counts contained therein: 9 Yer., 202; *et vide Teas* v. *The State*, 7 Hum., 174; *Staggs* v. *The State*, 3 Hum., 373. The statute requires that upon every indictment the Attorney General shall indorse the names of such witnesses as he wishes summoned in the case, and sign his name to said memorandum: Code, 5596. This has been done in this case; and it is insisted that this signature to the memorandum, upon the back of the indictment, is an official authentication of the whole paper. This memorandum and signature have their appropriate office, and none other. They do not purport to give, nor do they give,

the official sanction to the accusation of crime contained on the face of the indictment. They constitute a mere direction to the Clerk to summon the witnesses whose names are therein given, and may or may not have been placed there after the finding of the bill, and its return by the grand jury into court. But, however this may be, it is not such a signing as the law contemplates.

The judgment of the Judge of the Criminal Court, quashing the indictment, is affirmed.

The State v. Calvin Logston.

Costs. *Want of jurisdiction. Change of venue.* Where a change of venue, prohibited by the Constitution, is ordered, and the court to which the change is made, in consequence, has no jurisdiction, it can render no judgment for the costs of a trial which has taken place there; nor can the court of the county from which the cause came.

FROM FENTRESS.

Circuit Court, July Term, 1871. Motion before E. T. Hall, J., to tax costs, allowed. J. M. Thornburg, District Attorney, appealed for the State.

Attorney General Heiskell, for the State.

The State *v.* Calvin Logston.

NICHOLSON, C. J., delivered the opinion of the Court.

Calvin Logston was indicted for murder in Fentress county. His cause was transferred by change of venue to Scott, where he was tried and convicted, and an appeal taken to this Court. The judgment was reversed here, upon the ground that the Circuit Court of Scott county had no jurisdiction of the case, the same having been illegally transferred to that county from Fentress. The defendant was remanded to Fentress, where the District Attorney General entered a *nolle prosequi* upon the indictment on which he had been tried in Scott. Whereupon, the costs were ordered to be taxed; but no costs for the case, while it was pending in Scott county, were taxed. Afterwards, a motion was made in the Circuit Court of Scott county, for the re-taxation of the costs of this cause, while pending in that county. The motion was sustained by the Circuit Judge, and the costs properly chargeable to the State were ordered to be re-taxed. From this order the District Attorney General appealed to this Court.

We are unable to find any authority for the action of the Circuit Court of Scott county. The proceedings there were *coram non judice*, and void. Nor had the Circuit Court of Fentress any power to tax the costs after the case had been removed from that county to Scott. It seems to be a case in which this Court can give the parties no relief. The Legislature alone can furnish a remedy.

The order of the Circuit Court will be reversed, and the motion be disallowed and dismissed.

EMERSON WILSON *v.* THE STATE.

1. INDICTMENT. *Affray. Public place.* An indictment for an affray charging a fighting in a public place, is good without further description of the place.
2. AFFRAY. *Need not originate in a public place.* A fight commenced in private, but carried by flight and pursuit to places where people are assembled, is an affray.
3. ERROR. *Charge on hypothetical case.* An error in the charge of the court below, which has no application to the facts proved, is not a ground of reversal.

FROM BLOUNT.

In the Circuit Court, December Term, 1870. E. T. HALL, J., presiding.

CATE, for the plaintiff in error.

Attorney General HEISKELL, for the State.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiff in error was indicted in the Circuit Court of Blount county, at the May Term, 1870, for an affray. The indictment charges that defendant, "on the 10th day of April, 1870, with force and arms, an affray did make by then and there fighting with James Lemons, in a public place, to the terror of the good people of the State then and there assembled," &c.

Defendant plead not guilty, and upon the trial was convicted and fined. Upon the discharge of his motion for a new trial, he tendered his bill of exceptions and appealed to this court.

Emerson Wilson *v.* The State.

The first error assigned for reversal is, that the presentment is defective in not charging in what kind of a public place the affray occurred. The presentment is a copy of one in the case of the *State* v. *Benthal*, 5 Hum., 519, which was sustained by the court as sufficient.

The next error relied on, is, that the evidence does not support the verdict, inasmuch as it proves that the fight was not in a "public place," but was in an old field. One of the witnesses, John Hyde, describes the affray as follows: "That he saw James Lemons coming through Everett's field with Ben Owens, Emerson Wilson and James Brown, in pursuit of him; they were all throwing rocks; they came on through the field and went to Mrs. Dowell's house; they were all throwing rocks; were in a considerable run; there were several houses in sight—Mrs. Dowell's, my father's, and Mr. Baker's, and some houses near the depot. It was in a half or three-quarters of a mile from the court-house. They went to Mrs. Dowell's house, and soon left there and went over towards the house of Mr. Allen—Lemons in front, and the others still pursuing him; they were all still throwing rocks. They started on the run from near the railroad; people are accustomed frequently to pass along the railroad on foot; they crossed the main road leading from Maryville to Knoxville while in the row; they were in distance to hit each other while throwing rocks and sticks."

The evidence of the other witnesses does not differ materially from that of this one. From all which, it is pretty clear that the fight commenced in the old field, and it does not appear that that was a public

place. But there seems to have been three against one, and we infer that the fight in the old field was of short duration before Lemons concluded that he could succeed better in a running than in a stand-to fight. The evidence makes it clear that the fight was not brought to a final issue in the old field, but that it was kept up with rocks and sticks until the parties reached the houses of several neighbors, at which places the rocks continued to fly. We are satisfied that it was all one fight, or more properly a fight in the old field with a *continuando* in public places around and through the houses of the neighbors generally. We are, therefore, of opinion that, while the proof shows that there was fighting in a place not public, it also shows that there was fighting in places that were public, and that the evidence supports the verdict.

The last error assigned is, that the Circuit Judge erred in charging the jury that, "if people should assemble while a fight is going on in a private place, that it would then be a public place." Perhaps the charge was subject to some criticism if the judge meant that if people were attracted to a private place where a fight was on hand and the fight brought them there, then that would make it a public place. But we do not so understand the charge. We understand him to say, that "whether the people had assembled suddenly for some lawful and innocent purpose, or whether they were present living there, and in fact did see and hear the fighting, and were put in terror," it would be a public place. But if the charge was slightly erroneous, it could not have been injurious to

defendant, as it was upon an abstract question which was not presented by the evidence. The evidence described fighting where there were families of people who were at home and were under no necessity to go out to the old field to witness it. The parties brought the *row*, as one witness calls it, to their very doors and forced them to see the rocks flying and hear the noise.

Upon the whole case, we are of opinion that there is no error, and we affirm the judgment.

THE STATE *v.* T. M. SCHLIER.

1. CONSTITUTIONAL LAW. *Judicial Construction. Privilege.* The judicial construction of the word "privilege," established before the Constitution of 1870, is adopted by that Constitution.
2. PRIVILEGE TAX. *Valid, though unequal.* The Act of 1870, c. 71, s. 1, taxing photographers as exercising a privilege, is constitutional. The fact that the privilege is discriminated according to the size of the town where the establishment is situate, does not affect the constitutionality of the law.
3. PRIVILEGE. *Defined.* The exercise of an occupation or business which requires a license from some proper authority, designated by a general law, and not open to all or any one without such license, is a privilege within the meaning of the Constitution.

Cases approved: *French* v. *Baker*, 4 Sneed, 193; *Robinson* v. *Henegar*, 5 Sneed, 258.

Constitution construed: Art. 11, s. 8; Art. 2, s. 28.
Statute cited: 1870, c. 71.

FROM KNOX.

Presentment in the Criminal Court, September Term, 1870. M. L. HALL, J., presiding, at May Term, sus-

tained a demurrer to the indictment, and the District Attorney appealed.

Attorney General HEISKELL, for the State, said that the decisions justified this definition of a privilege. "It is that which the Legislature chooses to tax as such," and cited *Cole* v. *The State*, 3 Sneed, 120; *Mabry* v. *Tarver*, 1 Hum., 94, 98; *French* v. *Baker*, 3 Sneed, 195; *Robinson* v. *Henegar*, 5 Sneed, 258; *M. & A. of Columbia* v. *Guest*, 3 Head., 414. He thought there was much reason to believe that privilege in the Constitution of 1834 had been misconstrued, but that the Constitution of 1870 adopted it with the construction previously put upon it.

L. A. GRATZ, for the defendant, insisted that the discrimination in the Act of 1870, affixing a higher tax upon artists situate in large towns, was against the Constitution.

NICHOLSON, C. J., delivered the opinion of the Court.

Defendant was presented at the September Term, 1870, of the Knox county Criminal Court, for having a gallery for taking photographs, ambrotypes, and other likenesses, without paying the privilege tax and taking out a license, contrary to the Act of February 24th, 1870, ch. 71, sec. 1. The Circuit Judge sustained a demurrer to the indictment, upon the ground that the Act of Assembly imposing the tax was unconstitutional, and quashed the same. From this judgment the State has appealed.

The Constitution of 1834 contained the same lan-

guage, as to the taxation of "privileges," that is found in the Constitution of 1870. It is as follows: "But the Legislature shall have power to tax merchants, pedlars, and privileges, in such manner as they may from time to time, direct." This language had been judicially interpreted in several cases; prior to the adoption of the Constitution of 1870. In the case of the *Mayor and Aldermen of Columbia* v. *Guest*, the Court said: "We have defined it in several cases, to be the exercise of an occupation, or business, which requires a license from some proper authority, designated by a general law, and not open to all, or any one, without such license": 4 Sneed, 193; 5 Sneed, 258.

Such was the fixed judicial interpretation of the word "privileges," when the Convention of 1870 adopted exactly the same language, in forming the present Constitution. It was adopted with a full knowledge of the meaning which had been attached to it by the courts. This is conclusive as to the present interpretation to be placed on it.

The Act of February 24th, 1870, c. 24, sec. 1, is as follows:

"From and after the passage of this Act, artists taking photographs, ambrotypes, or any other likenesses, shall take out a license semi-annually, and pay a privilege tax therefor, as follows: For each and every gallery located in a city of over three thousand inhabitants, thirty-five dollars; for each and every gallery located in a town of from five hundred to three thousand inhabitants, twenty dollars; for each and every gallery located in a town of less than five hundred inhabitants, or in the country, five dollars. Said tax to be paid to the Clerk of the County

Court of the county in which the gallery may be located."

This Act constituted the occupation or business of taking photographs, ambrotypes, and other likenesses, a privilege, according to the established definition of that term. Under the power "to tax privileges in such manner as the Legislature may from time to time, direct," this Act is constitutional, unless it is in conflict with Art. 11, Sec. 8, of the Constitution. This section is as follows:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

By the plain and express language of Art. 2, Sec. 28, the Legislature has the power to exercise its discretion as to the mode of taxing privileges. If there is a conflict between this section and Sec. 8 of Art. 11, it is our duty so to construe them as to make both sections operative. But the first question is, does such conflict exist? It can not be maintained that the first clause of Sec. 8, Art. 11, is violated by the Act of February 24, 1870, c. 71, because this Act does not suspend any general law for the benefit of an individual, nor is it a law for the benefit of individuals, inconsistent with the general laws.

But it is insisted that the next clause in Sec. 8,

Art. 11, is inconsistent with, and restrictive of Sec. 28, Art. 2, and, therefore, that the Act of February 24, 1870, c. 71, being in violation of the restrictive section, is unconstitutional. If the premise is correct, the conclusion is legitimate. Then the enquiry is Does the Act of February 24, 1870, c. 71, grant to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, under that Act, extended to any other member of the community? The Act fixes a maximum tax on photographers of $35; and this is assessed on all who have galleries in cities of 3,000 inhabitants and over. There are no rights, privileges, immunities, or exemptions, granted to such artists, which may not be extended by this law to any other member of the community, who may choose to open a gallery for taking photographs, &c., in a city of 3,000 inhabitants or over. It is not easy to understand what kind of rights, privileges, immunities, or exemptions, those are which are granted to an artist by taxing him $35 for exercising his art.

But the Act assesses a tax of $20 on those photographers who exercise their art in a town of not less than 500 and not more than 3,000 inhabitants. Is this class legislation? This class of artists enjoy no rights, privileges, immunitics, or exemptions, which any other artist can not enjoy under the same law. If the artist, in a city of 3,000 inhabitants or over, desires to enjoy the exemption or immunity from the tax of $35, under this Act, he can have the right and privilege of living in a town of less than 3,000 in-

habitants and not more than 500, by moving his gallery there—the Act presents no obstacle to his doing so. So, in like manner, under the Act, the classes of artists who are required to pay $35, or $20, can be exempted from these taxes, and have the benefit of a $5 tax, by taking their galleries into a 500 inhabitant town, or into the country. It can not be class legislation when every member of the community has the right to turn photographer, and exercise his art, either in a city, in a town, or in the country, as he may elect.

As to the policy of the graduation of the tax, according to the size of the city or town, we have nothing to say. This is a matter left to the discretion of the Legislature by Art. 2, Sec. 28; and we do not think that Art. 11, Sec. 8, contains any restriction on that discretion which has been violated by the Act of February 24, 1870, c. 71.

We, therefore, reverse the judgment of the Circuit Court, and remand the cause to be further proceeded in.

Doc. Lonas v. The State.

Constitutional Law. *Intermarriage, or cohabitation of negroes and whites.* The act of 1870, c. 39, making it a felony for white persons and negroes to marry or cohabit together as man and wife, is a valid act, not affected by the Constitution of the United States, the Civil Rights bill, or Enforcement law.

FROM KNOX.

Criminal Court, June Term, 1871, before M. L. Hall, J.

The proof showed "that the defendant was married to and lived and cohabited with the person charged in the indictment, previous to the finding of said indictment." The indictment was found March 8, 1871. The prisoner being unable to employ counsel, the Criminal Court assigned J. Scott Payne, Esq., to defend him, who also appeared for him in the Supreme Court.

J. Scott Payne, for the prisoner, insisted that the act of 1870, c. 39, prohibiting the intermarriage or cohabitation of whites and negroes, was in violation of the 13th and 14th amendments to the Constitution of the United States, and the act passed pursuant thereto, of April 9, 1866, the Civil Rights Bill, and the reënactment and amendment thereto, following the 15th amendment, of which he gave a history. He insisted, 1st, that this Court had no power to decide upon the validity of a constitutional amendment, by reason of any irregularity in its adoption; 2d, that, by the 13th, 14th

and 15th amendments, and the Civil Rights Bills, all distinctions on account of race, color and previous condition of servitude, are obliterated. That the 15th amendment, relating exclusively to political rights, had nothing to do with this question. Congress intended the negro should have power to enforce civil contracts, and to enjoy the privileges and immunities of white citizens. He defined rights and privileges, citing Crabbe's Synonyms. He announced the general proposition that, if the doing of some thing, or the enjoyment of some advantage, be permitted to one class, and prohibited to another, then a distinction was made. That the negro, by the act of 1870, was deprived of the right to make contracts, which a white man could make; that is, to contract marriage with a white woman. That the act created classes, and that, itself, was a distinction. It would not do to say that the statute operates alike upon both, punishing white and colored persons alike, for an offense common to both. Here is the very distinction the law prohibits, *i. e.*, the denial of the power to make a contract of a particular kind with individuals of the other class. The two classes are forbidden to intermarry, for the reason that there is a distinction between them in race and color, made by nature. The statute recognizes and asserts this distinction, and makes it a bar to intermarriage, the very thing which the Constitution and laws of the United States intends to prohibit. The State may as well prohibit the intermarriage of American and German or French. Any attempt to show by argument that this statute does not make a distinction, is the veriest sophistry. That marriage is not only a civil con-

tract, but a civil *status*, citing Ch. Blackstone, p. 432, m.; Bishop on Mar. and Div., § 29; Shelford on Mar. and Div., 2; *Dickson* v. *Dickson*, 1 Yer., 110, 112; 1 Meigs' Dig., § 1059; *Grisham* v. *Ligan*, 2 Yer., 589; *Clayton* v. *Wardell*, 4 Comst., 230; Story's Confl. of Laws, § 108, n.; but he insisted that the law only regarded it in the aspect of a civil contract, and claimed that it was within the class of contracts contemplated in the first section of the Civil Rights Bill. This case involves only one of the requisites of the contract. Their willingness to contract, and their actual entry into the marriage relation, is not disputed; the point disputed is their ability to contract. The 14th amendment enables these parties to *make and enforce* any civil contract that was legal between other citizens of the United States. The citizenship of the plaintiff in error was placed on the same footing as that of the white man. In the case of *The U. S.* v. *Lucerne*, 2 Brightly's Dig., p. 16, it was held that persons of color were naturalized, and being so, were possessed of the same rights as white citizens, in every respect. See, also, *ex parte Turner*, 1 Am. S. T., 7.?

No State can make a foreigner or other person a citizen: *Scott* v. *Sandford*, 19 H., 393. The converse of this must be true: no State can abridge or take away rights of citizenship once vested in a class of persons.

A marriage legal where made, is legal everywhere: Bishop on Mar. and Div., § 125; 2 Kent, 457; *Bashaw* v. *The State*, 1 Yer., 177; *Sellars* v. *Davis*, 4 Yer., 503; Shelford on Mar. and Div., 114; 2 East, 453; 1 Bland, 485. In certain States the intermarriage of whites and blacks is not prohibited, as in South Carolina and Missis-

sippi. If negroes intermarry with whites in those States, they must be protected here in the marriage relation. See *Morgan* v. *McGhee*, 5 Hum., 13. The Federal Constitution, Art. 1, s. 10, prohibits any State from impairing the obligation of contracts. White and colored persons who have contracted marriage in other States, are protected by this clause. So, while persons generally, of their class, *i. e.*, those married here, are prohibited from living together here, we have in these a privileged class, contrary to the spirit of our laws and institutions. The prohibited classes have only to step across the line into a State where the marriage is lawful, and they can contract a lawful marriage there, though they go there for the purpose of evading our law; Story's Confl. Law, §§ 79-81; *Medway* v. *Needham*, 16 Mass. R., 157. It would seem that our statute, by prohibiting the cohabitation of persons in such condition, has gone so far as to declare that our courts shall not recognize the validity of such marriages, thus making a sweeping statutory divorce. This is clearly in conflict with Art. 1, s. 10, Const. U. S. He argued that such unions were repugnant to our tastes and prejudices; but, in presence of a plain principle of law, all such feelings must yield. The responsibility was with Congress, who had passed the law, and with them the remedy. He commented at some length upon the opinion of Judge Erskine, of the United States Court, recently delivered in Georgia. Insisted that marriage was proved to be a contract by the fact that a breach of contract to marry was ground of a civil action, and cited *Ponder* v. *Graham*, 4 Fla. R., 23, to show that the contracts protected by the U. S. Const. were not to

be restricted to those of a pecuniary nature. Cited *State* v. *Fry*, 4 Mo., 120, 184, as showing that it applied to the marriage contract; and Story on the Const., § 1374, on the obligation of contracts. Insisted that marriage is not valid without a contract; that the contract exists from the time the parties having the capacity agree upon a marriage; and the instant they become man and wife the *status* begins, and the contract essential to the *status* becomes a part thereof.

He contested Judge Erskine's opinion, that the amendment and act of Congress were intended to secure to negroes equality *before the law*, and that the privileges and immunities in Art. 4, s. 2, of the Const.—those granted by the States to their own citizens—were the same intended by the 14th amendment and the acts of Congress. But if this were so, and the meaning is the same, the new citizens brought within the pale of the Constitution, are entitled to all the privileges of the old, and become beneficiaries of Art., 4, s. 2, of the Const. In *Henry* v. *Smith*, 1 Lit., 334, it is held that no one can be a citizen within the terms of Art. 4, s. 2, who is not entitled to all the rights and privileges of the higher classes of society. Free negroes were not such at that time; but they became such by the amendment and act of Congress. To strip a citizen, then, of any of the privileges enjoyed by others is to strip him of citizenship, and a violation of the amendment and act of Congress.

He remarked, upon Judge Erskine's observation, that the U. S. Courts have generally refused to take cognizance of Divorce; that if this were to be regarded as

the exercise of a power of divorce, the Legislature could not exercise that power where they had conferred it on the courts. He insisted that the act of 1870 was retrospective and *ex post facto*, contrary to the State Constitution, Art. 1, ss. 11 and 20, the parties having lived together before the passage of the act. That every offense was made up of three parts, the beginning, the continuance and the end. That any punitive statute, to be valid, must be in force at the beginning of the act, and none enacted between the extremes and during the continuance of the act can affect the parties committing it.

Attorney General HEISKELL, for the State, said the act forbidden, was any law which should "abridge the privileges or immunities of citizens of the United States," or "deny to any person the equal protection of the laws."

The rights of citizens of the United States, are not the rights of citizens of States, but those political and civil rights, guaranteed by the Constitution of the United States. These are of the most restricted character. Even the right of suffrage was not one of them, under the original Constitution; the right to hold office is not one of them. A citizen of one State has no right to vote in another. If it was a right which belonged to him as a citizen of the United States, then this right to vote in a State could not be denied by the State, or delayed even for a time. The right was conferred and regulated by State law, and the Constitution gave no power to Congress over that subject, but expressly made even the right to vote for members of Congress dependant upon the qualification of electors of the most

numerous branch of the State Legislature. A man as a citizen of the United States, can hold no office in a State. His qualifications are defined by State laws. A citizen of the United States, as such, cannot even be President of the United States; the only persons who are peculiarly citizens of the United States, as distinguished from citizens of States, being naturalized foreigners. A President must be a citizen of a State, a native. The privileges of a citizen of the United States, affect him in his foreign relations, and in his constitutional guarantees under the Constitution of the United States; against bills of attainder; *ex post facto* laws; laws impairing the obligation of contracts; the guaranty of a republican form of government; the right as a citizen of one State to the privileges of citizens in other States. Under the 13th Amendment, he may claim personal freedom, and under the 15th, the franchise. There may be others, but these are the principal rights, privileges and immunities of a citizen of the United States. In fact, up to the time of these amendments, there was no such thing, except to foreign states, as a citizen of the United States. How far this is creative of a new relation, need not be discussed. The negro is invested with new rights; but does not the old citizen hold his old right by the old muniment? Is he not still a citizen of his State? If so, the rights which the negro acquires are like to his; that which the Chinaman born here, acquires, are like to his.

Marriage is in no sense a privilege which the citizen has, as a citizen of the United States. They have never attempted to regulate marriage in a State, and they have no right to. It is not claimed or held of the United

States, but of the State. If the courts of the United States can ever have the right to take cognizance of the question of marriage, it is as they do many questions arising under State laws and in the administration of State laws, between parties whose *status* as citizens of different States, or the like, is the ground of their jurisdiction. The right of a man as citizen of the United States, might include the right of a citizen of one State in which he had contracted a valid marriage, to have the lawfulness of his marriage recognized in another, or the lawfulness of his issue acknowledged. But he can not come here and claim all the rights he held in his own State. There he could vote; here he can not, for a time at least. That right was as perfect there, as to live with his wife. There he might hold office; here he can not. By what warrant, then, will he claim a right here, which we deny to our own citizen? The right! to shock the public sense by a mixture of incongruous breeds. Take the case of the Mormon, and allow his marriages to be valid at home; can he come here and defy the public sense by keeping a seraglio here? The marriages of the Turk are valid at home, and his issue would all be legitimate by our law; but would we be obliged to allow him to keep his numerous wives here? Admit Utah as a State, and this question might be a practical one. But it has nothing to do with the case. The plaintiff in error is not shown to have been the citizen of any other State, or to have contracted a marriage there. The rights of citizens of other States are not involved in this case, and the discussion of that question throws no light on this. All that the record

shows, is, that before this indictment these parties had gone through the forms of marriage, when it was prohibited by law, and for all that appears, when it was a felony.[1] Has the State the power to regulate the marriage relation? Does it abridge the privileges of a citizen of the United States, to prohibit him from marrying his cousin, or his deceased wife's sister, or a blind person, or a deaf mute, or a lunatic? If he has that right as a citizen of the United States, to take it away would abridge his privilege. Could he, as a citizen of the United States, resist such abridgement? If he held it as such, he could. If not, it is because he holds his privileges in this regard, of the State.

This party is not protected by the clause prohibiting laws impairing the obligation of contracts, on two grounds. It is one thing to impair the obligation of a contract; another to prohibit beforehand, the making of a contract. Here was no contract; such marriages being prohibited from time immemorial. It stands as a contract on the footing of gaming contracts, usurious, illegal, fraudulent or unwritten contracts, declared beforehand to be void. These violate no obligation—they prohibit it. After a valid contract is made, the State can not for any of these causes, declare it void by retrospective law. This marriage, then, being subsequent to the law making it void, is never a contract.

But marriage is not a contract. It is a relation, or

[1] This disposes, too, of the question of *ex post facto* laws. The facts do not raise it in any form. It would amount to nothing, if it was raised in that form, for it is the "cohabitation" which is the offense, and that is subsequent to the law.

a *status*. The authorities say that it is a civil contract. They might as well say, that, because I bought my horse, my horse is a contract. Neither my horse, nor my relation to him of owner, is a contract. My property is the result of contract, but my property is something different from the process by which I acquired it. Is the fee in land which we hold by deed, itself a deed, or a contract of which the deed is evidence? Was it a contract when my vendee held it; when the government owned it? It was then disembodied of any such quality; did it become a contract when it passed from the government, or when?

Marriage is based on contract; the result of contract. It is like a title in this, that it is affected by contract; but unlike a title in this, that the marriage originates in and is created by contract. The title only passes by contract, is not created by it. But the thing created, the marriage relation, and the thing which creates the relation, the contract, are distinct things. It is not proved to be a contract by the fact that a contract to marry is valid. A contract to marry is not a contract of marriage. If it made the parties man and wife, no suit would lie on it, because it would perform itself. But marriage is the performance, and a refusal to marry is the breach. The contract being made and valid, and consummate by the natural bond of sexual connection, the relation has begun. But the relation is as distinct from the contract as the contract of marriage is from the contract to marry. That this relation is subject to the law of the State, without any restriction from the Constitution of the United States, is too clear for argument. A few cases can

be found against it, but the numerous divorce cases in this and other States, leave it beyond question. It was not one of the contracts which the Constitution of the United States had in contemplation. A reference to the history of the period preceding the formation of the Federal Constitution is the best guide to the construction of that clause. The evil to be remedied was, that States had declared parties relieved from their contracts, and this affecting creditors beyond the States, was felt to be an evil which would justify a constitutional prohibition. On the ground, then, that there never was a valid contract of marriage here, and if there had been, it was not such contract as was within the meaning of the Constitution of the United States, this cause of objeciion must fail.

What is it that prohibits distinction of race, &c.? The 14th amendment prohibits the denial of *equal protection of the law.* The Civil Rights Bill says that every citizen, without regard to race, color, or previous condition of servitude, shall have the same right in every State and Territory, "to *make and enforce contracts*, to sue, be parties, give evidence," &c. This made no change in the law of Tennessee. Every one of these things, except as to evidence, was the law of Tennessee from the time it was a government. As soon as the slave became free, he could make and enforce contracts, sue, and be a party. Nay, so jealous was our Constitution of real principles, that, from 1834, when the right of the free negro to vote was denied, the right to tax his person was taken away by the Constitution. The act of Congress of May 31, 1870, is somewhat more full. It declares that "all per-

sons within the jurisdiction of the United States," shall have the same right in every State and territory "to make and enforce contracts, to sue, be parties, give evidence, *and to full and equal benefit of all laws and proceedings for the security of persons or property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and none other.*"

The same right to make and enforce contracts; what contracts? such as are made and enforced. The contract to marry can not be enforced, specifically executed, any where. The contract of marriage is never enforced. The words make and enforce, denote clearly that the contracts spoken of are the ordinary contracts of commerce and business: the contracts of which the Constitution, Art. 1, s. 10, treats. If not, the negro is to have the same right; not one superior to the white. This does not give him a right to make a contract with a white man which the white man is prohibited from making with him. This is impossible and absurd.

It is said, this is discrimination against the negro. Really, those laws were intended to repress the white race, and not the negro. The negro was not considered as hurt by the intermixture of the white race, but it was the deterioration of the white race that was against policy. The parties were both punishable, it is true, but there was never an instance of the negro being subjected to the infliction. It was not *then* aimed especially against the blacks. Is it any more so *now*, as to the contract. They have the same right to make and enforce contracts with whites that whites have with them, but no rights as to the white race which the white race

is denied as to the black. The same rights to contract with each other that the white have with each other; the same to contract with the whites that the whites have with the blacks, but not a superior right of a negro to marry a white woman, when a white man can not marry a negro. If the males of one race had the right to appropriate the females of the other, while that right was denied to the males of the other race, there might be some foundation for the charge of discrimination.

The contract of marriage was never interfered with by Congress before, and if these acts can have such a construction as to exclude marriage from their operation, without manifest violence to the language, the established rules of construction will require that it should be done. In statutes generally, marriage is not spoken of as a contract. In our State it is solemnized, not contracted. The contract is subordinated to the family relation. We depart from the true principle of construction if we make contract include this relation, when it has its whole ordinary scope in protecting the ordinary contracts elsewhere regulated in the Constitution.

There is no discrimination, as will be seen the moment we eliminate the prejudice of class. The Mosaic law forbade the Jews to gender animals of a diverse kind together. Was there discrimination there between the horse and the ass? Would a law now against breeding mules be a discrimination? If so, against which animal? Is a law against breeding mulattoes any more so? This is the substance of our law, to prevent the production of this hybrid race. To prevent violence and blood-

shed which would arise from such cohabitation, distasteful to our people, and unfit to produce the human race in any of the types in which it was created.

The equality intended, is not equality in all things, but equal *protection* of laws and proceedings for the *security* of *persons and property.* Of *habeas corpus*, warrant on oath, freedom from unreasonable searches and seizures, trial by jury on indictment or presentment, and the like. No prohibition of discrimination is found in the law. That is a preconceived idea of the advocate.

SNEED, J., delivered the opinion of the Court.

This case involves the grave question, whether a white person and a negro may lawfully intermarry, or cohabit, as man and wife, in this State. The prisoner is a negro, and was indicted, tried and convicted, of the offense of cohabiting, as man and wife, with one Rebecca Teaster, a white woman, on and before the 10th of January, 1871, in the county of Knox. He was adjudged to suffer confinement in the Penitentiary for two years and six months, and to reverse said judgment, he has appealed in error.

The Act of 1870, c. 39, forbids the intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation inclusive, and their living together as man and wife in this State. The statute is in the identical words of the Constitution of 1870, art. 11, s. 14, the last clause of which imposes upon the Legislature the duty of enforcing the provision by appropriate legislation. The second section in the statute is in the words following: "The persons knowingly violating the provisions of the first

section of this act, shall be deemed guilty of a felony, and upon conviction thereof, shall undergo imprisonment in the penitentiary not less than one, nor more than five years; and the court may, in the event of a conviction, on the recommendation of the jury, substitute in lieu of punishment in the penitentiary, fine and imprisonment in the county jail:" Shank. Sup., 102.

It is contended by the counsel for the prisoner, in an argument of much force and ability, that the statute of the State for the regulation of its internal polity upon the subject of marriage, and the provision of our organic law upon which it is founded, are repugnant to the constitution and laws of the United States, and, therefore, null and void. It is certainly true that the supreme law of the land, in this country, is the Constitution of the United States, and the laws made in pursuance thereof, and the treaties made or which shall be made, under the authority of the United States, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding: Con. U. S., Art. VI, s. 2. And "whether the State law is organic, in its constitution or any ordinance, or whether it be a statute, if it violate the constitution, laws, or a treaty of the United States, it is simply void, and the courts of every State are bound by the supreme law, and not by the State law:" *Marbury* v. *Madison*, 1 Cr., 137; *Calder* v. *Bull*, 3 Dall., 386; *Satterlie* v. *Mattison*, 2 Peters, 380; Ex parte Garland, 4 Wall., 399; Pasch. Anno. Cons., 250. But it is the glory and the boast of our written constitution, that the powers of the law-makers are restricted and defined; and while it is the legitimate

and lawful province of the Supreme Judicial Tribunal of the Union to determine the validity of a statute assumed to have been enacted under the authority of the organic law, it is no less the prerogative of the State tribunal to interpret its own State laws, and to pronounce upon their compatibility with the supreme organic law. And to this end, they may look beyond a statute of the general government which seems to collide with the law and polity of the State, to ascertain whether such statute is made in pursuance of an authority vested by the supreme organic law. For it is not every Act of Congress that the "judges in every State" shall be bound by, but only such as are passed in pursuance of the authority granted by the Constitution. And this power of a State Court to pronounce upon the validity of an Act of Congress which is made to operate upon the people, subject to the jurisdiction of said court, has been exercised from the foundation of the government, of which we have a notable illustration in the action of half a dozen State courts within the last few years, in declaring the Stamp Acts of Congress, so far as they changed or interfered with the rules of evidence in the State courts, to be unconstitutional and void. Until the Supreme appellate tribunal of the Union shall declare otherwise, that question is at rest in the States whose courts have so decided. The government of the United States being one of limited powers, is, therefore, supreme only to the extent of the granted powers; and all laws upon the rights, duties and subjects specially enumerated and confided to its jurisdiction, are necessarily exclusive and supreme: Sims' Case, 7 Cush., 729. If, therefore, a law be enacted not authorized

by the enumerated or clearly implied powers, it is not in the sense of the constitution the supreme law of the land, and the courts of the States are not bound to carry it into execution. But the Supreme Court of the United States is the tribunal of last resort on all such questions, whose judgment is conclusive and final upon the question, whether an Act of Congress be or be not the supreme law of the land: *Ableman* v. *Booth*, 21 How., 519. When it it is so declared, it is as much the duty of the State courts to accept and enforce it, as it is their province and duty, in the first instance, to question its validity, and decline to enforce it, when in their judgment it has been enacted without authority.

"Among the powers," said Judge Curtis before the late amendments, "unquestionably possessed by the States, was that of determining what persons should and what persons should not be citizens; and each State must determine," said he, "what civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost:" *Scott* v. *Sandford*, 19 How., 583.

In the evil days to which we have brought ourselves by our late unhappy feuds, we are too apt to forget the moorings of the law, where our fathers left us. While it is our first duty to respect and obey every valid law that emanates from the law-making power of the Federal Government, yet we are too prone to magnify the civic powers of a government which has so lately crushed a dozen great States by an exhibition of military power that might have defied the world, and, lawyer and lawgiver, court and commonwealth, to bow without question to the civic will of the victor.

The Goths of ancient Germany, it is said, were accustomed to debate every important measure twice in their councils; once while drunk, that their debates might not lack vigor, and again, while sober, that they might not lack discretion. Now, that we have returned to the blessed paths of soberness and peace, when human rights and human wrongs are to be vindicated and redressed by the laws of the land and not by the logic of the bullet and the bayonet, it is well to look back upon our landmarks which our fathers have set, and ascertain what rights the States have not been bereft of as the result of the late unhappy civil war. And prominent and paramount among these, is the provision that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and to the people: Art. 10, Con. U. S.

The powers delegated to the United States, and those prohibited by it to the States, are ascertained and defined by the terms of the Constitution itself. "Those which are to remain in the State governments," said Mr. Madison, "are numerous and indefinite. The power reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberty and properties of the people, and the internal order, improvement and prosperity of the State:" Federalist, No. 45. Perhaps, we will be unable to find embodied in a few words so correct an idea of the general powers reserved to the States, as in this brief observation of one who was, without disparagement to his renowned compeers, the best authority, living or dead, upon the sense and meaning of our fundamental law. The Congress of the United States has never, from the foundation of the

government, interfered with the internal polity of the State, in regard to marriage or the other domestic relations, and we apprehend it never will. Those things have been left where the Constitution left them, and where Mr. Madison left them, to the States which control all matters "that concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."

But it is said that old things have passed away, and all things have become new; and that the late amendments which give freedom to the slave, and confer upon him the right of suffrage, and guarantee to him the equal protection of the law, vouchsafe to him, also, the right of intermarriage with the white race. The fourteenth amendment to the Constitution of the United States, or so much of it as is important to be considered here, is in the following words: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

What is called the Enforcement Act, which was passed to give effect to the provisions of the fourteenth amendment, as applicable to the question before us, is as follows: "All persons within the jurisdiction of the United States, shall have the same right in every State and Territory of the United States, to make and enforce contracts, to

sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions, of every kind, and none other; any law, statute, ordinance, regulation or custom, to the contrary notwithstanding."

The Civil Rights Bill, passed to give effect to the thirteenth amendment, which gave freedom to the slaves, is substantially and almost literally the same as the foregoing. The Enforcement Bill became a law on the 31st day of May, 1870, and the Civil Rights Bill several years before.

If the African, in this country, has been elevated to a perfect equality in social, as well as political, rights with the Caucasian; if that race can claim at all the right to marry and be given in marriage with the sons and daughters of our people, it must be claimed alone by virtue of the foregoing amendments and the laws enacted for their enforcement. The State, then, is forbidden from making and enforcing any law which shall abridge the privileges and immunities of citizens of the United States. It is said that "the words rights, privileges and immunities," are abusively used, as if they were synonymous. The word rights, is generic, common, embracing whatever may be lawfully claimed. Privileges are special rights, belonging to the individual or class, and not to the mass; properly, an exemption from some general burden, obligation or duty; a right peculiar to some individual or body. Immunities are rights of exemption only—freedom from what otherwise would be a duty or

burden:" Bates on Citizenship, 22. "These privileges and immunities," said Washington, J., "may be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety; *subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.*

The right of the citizen of one State to pass through or reside in any other State, for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold and dispose of property, both real and personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; to which may be added the elective franchise, as regulated and established by the laws and Constitution of the State in which it is to be exercised: *Corfield* v. *Coryell,* 4 Wash., C. C., 380. These are some of the privileges and immunities intended to be guaranteed to the citizen, "subject," says the learned Judge, "to such restraints as the government may justly prescribe for the general good of the whole." There are many others not herein enumerated, and upon which the courts will decide as the cases arise: *Conner* v. *Elliott,* 18 How., 591. The right of intermarriage among the races is, in the opinion of the Court, not one of them. Nor is marriage a contract, in the sense of the Constitution, which may be "made and enforced." It is called, in many of the books, a civil contract, for the want of a better

phrase. A contract, in the sense of these enactments, is such an agreement as may be specifically enforced, like a contract to pay money or to deliver property. Marriage is a mere covenant of the will; it may be considered, while executory, a contract, the breach of which is expiated in damages; but it reposes upon the consent of the parties. If that consent is withdrawn, there is no such thing known to our law as its specific enforcement. It, therefore, differs essentially from that species of contract contemplated by the Constitution, which may be made and then enforced in the courts, and the obligation of which can not be impaired by the legislative department. In the ecclesiastical law, it is defined to be a covenant between a man and a woman, in which they mutually promise cohabitation and a continual care to promote the comfort and happiness of each other. It is an institution of God, and a very honorable state. The Saviour honored it by his presence, and at such a solemnity wrought his first miracle: Buck Theo. Dic., 261; Heb. xiii.; Gen. ii.; John ii. "It is the civil *status*," says Mr. Bishop, "of a man and a woman, united in law for life. In the sense in which it is dealt with by a decree of divorce, it is not a contract, but one of the domestic relations. It derives both its rights and its duties from a source higher than any contract of which the parties are capable; and as to these, it is uncontrollable by any contract they can make. Although it may be formed by a contract, yet when formed, it has none of the attributes of a contract, but becomes a domestic relation. And," says he, "it is no more a contract than a fatherhood, or sonship, or serf-

dom, or slavery, or apprenticeship, are contracts:" 1 Bish. Mar. & Div., 10. "Thus," says Robertson, C. J., "marriage, though in one sense a contract, because, being both stipulatory and consensual, it can not be valid without the spontaneous concurrence of two competent minds, is, nevertheless, *sui generis*, and, unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of all, is regulated and controlled by the sovereign power of the State:" *Maguire* v. *Maguire*, 7 Dana, 181. It is said again, to be the particular glory of the social system; and the idea that any government could, consistently with the general weal, permit this institution to become merely matter of bargain between men and women, and not regulate it by its own power, is too absurd to require a word of refutation:" 1 Bish., 13; 2 Story's Confl. Laws, § 108; 1 *Id.*, § 200. The highest and holiest duty of every government is to provide for the happiness and general welfare of its people. How and in what manner this is to be best subserved, is a question for the political power; and the police power, which is inherent in all governments, is to be exercised without question. These powers, like privileges and immunities, heretofore considered in this opinion, can not well be enumerated. "The framers of the Constitution," said Marshall, C. J., "did not intend to restrain the States in the regulation of their civil institutions, adopted for internal govern-

ment; and the instrument they have given us is not to be so construed:" *Dartmouth College* v. *Woodward*, 4 Wheat., 518–629. These police powers of the State extend to every conceivable subject, where the good order, the domestic peace, the private happiness or public welfare of the people demand legislation. Unless that legislation is inhibited in the fundamental law, no State has acquitted itself of the duties of government without it. We hold that such legislation is not, never has been, and never should be, prohibited to the States, in reference to the intermarriage of the races. It has been repeatedly held by the Supreme Court of the United States, that a State may determine the *status* of persons within its jurisdiction: *Groves* v. *Slaughter*, 15 Pet., 419; *Moore* v. *Illinois*, 14 How., 13; 11 Pet., 131; Story Const., §§ 1098, 1804, 1809. The right to regulate the institution of marriage, to classify the parties and persons who may lawfully marry, to dissolve the relation by divorce, and to impose such restraints upon the relation as the laws of God and the laws of propriety demand, has been exercised by all governments, and in all ages of the world. The discrimination as to race and people, in this most important institution, has been observed, even from the days of the patriarchs, and even as to different people of the same race. "Thou shalt not," said Abraham, "take a wife unto my son of the daughters of the Canaanites, among whom I dwell; but thou shalt go unto *my* country, and to *my* kindred, and take a wife unto my son Isaac:" Gen. xxiv. The laws of civilization demand that the races be kept apart in this country. The progress of either does not depend

upon an admixture of blood. A sound philanthropy, looking to the public peace and the happiness of both races, would regard any effort to intermerge the individuality of the races as a calamity full of the saddest and gloomiest portent to the generations that are to come after us. They are among us. They were faithful as slaves, and are becoming useful and valuable as laborers. There is scarce a family in the South that has not some memory, fresh and grateful, of affection and fidelity in these people during the late sad war. These should commend them to the protection and charity of our people. The courts will protect them in the enjoyment of every civil right guaranteed to the most favored citizen; for such we understand to be the sense of the amendments. Their rights, social, civil, political and religious, will be jealously guarded; but they must not marry or be given in marriage with the sons and daughters of our people. Such was the policy of our own legislation, as to bond and free, fifty years ago, and was at the time of the amendments in question. Such, also, were the laws of the British Colonies in this country, reënacted after the separation by the thirteen States. In Massachusetts, the Colonial act of 1707, entitled "An Act for the better preventing of a spurious and mixed issue," was reënacted under the State government in 1786, forbidding the intermarriage of the black and white races, and degrading the unhappy issue of such marriage with the stain of bastardy. And long after the abolition of slavery in that State, in the carefully revised Code of 1836, this "mark of degradation,"

says Taney, C. J., "was again impressed upon the race." 19 How., 413. And such, indeed, we believe, was the law of every State. The Congress has the same right to regulate this relation in the District of Columbia and in the Territories, that the States have within their own jurisdictions; and this power is at this moment being exercised in Utah, in the suppression of polygamy. We are of opinion that the late amendments to the Constitution of the United States, and the laws enacted for their enforcement, do not interfere with the rights of the States, as enjoyed since the foundation of the government, to interdict improper marriages; and that the act of 1870, c. 39, which forbids the intermarriage of white persons with negroes, mulattoes or persons of mixed blood, descended from a negro to the third generation, inclusive, and their living together as man and wife, in this State, is a valid and constitutional enactment.

Affirm the judgment.

Andy Williams *v.* The State.

ANDY WILLIAMS *v.* THE STATE.

1. COSTS. *Fees for taxing costs.* The Clerk of the Supreme Court is entitled to tax a fee of 50 cents in each case, for taxing and entering on the execution docket the bill of costs from the inferior, and an additional fee for taxing and entering the bill of costs in the Supreme, Courts.

2. SAME. *Law of, construed liberally.* The law of costs, is, by the Code, 3219, to be construed remedially, and this construction applies as well in favor of officers and witnesses, as to parties.

Code construed: 4551, 3219.

MOTION TO ALLOW COSTS.

NELSON, J., delivered the opinion of the Court.

The Attorney General and Clerk of this Court have submitted the question, whether the Clerk, in making out his bill of costs, is entitled to charge two fees, each of fifty cents, for making out and entering each bill of costs on the execution docket.

Section 4558 of the Code, allows Clerks of the Supreme Court the same fees allowed in Art. 1, §§ 4551, 4558. In section 4551, p. 811, the language is: "For making out and entering on execution docket, each bill of costs, 50 cents." The Clerk insists upon his right to charge the two fees, because he says that, in every case brought to this court from the lower courts, there is a bill of costs, and that this bill is copied and entered upon the execution docket here, and that, in addition to said bill, the Clerk enters upon the docket, separately, a bill of the costs of this court. The At-

torney General insists that, when the two are entered upon the docket here, they are, in fact, but one bill of costs; and that, upon any other construction, the bills of costs might be split up so as to make and enter a separate bill of costs in the name of each person entitled to costs.

Section 3219 of the Code is general in its terms, and applies to all the courts. It declares that "the law of costs shall be construed remedially, and not as the penal law;" and fixes a rule of construction broad enough to comprehend officers and witnesses, as well as the parties litigant.

By a rule of this court, adopted at Brownsville, 20th May, 1858, and re-adopted at this place, 19th September, 1870, it is made the duty of Clerks of the Supreme Court to re-tax the bills of costs sent up from the inferior courts, and to correct the same. The making out and entering a bill of the costs proper in the Supreme Court, is another service. The practice should be, and, we believe, is, to enter the bills separately, in such manner as to show, at a glance, what costs are taxed in this and the inferior courts; but whether the entries are made upon the same, or different pages of the execution docket, can make no difference otherwise than as a matter of convenience.

The Clerk will, accordingly, be allowed to tax the two fees, and this opinion will be a rule as to the Clerks of the Supreme Court in all civil and criminal causes.

HENRY MANIS *v.* THE STATE.

ELECTION GROUND. *Selling liquor near.* Under the act of 1869–70, c. 22, s. 4, prohibiting giving away or selling liquor, on election days, *near* an election ground, a gift or sale within one mile or one mile and a quarter of such election ground, is clearly prohibited.

FROM HAWKINS.

Circuit Court. Before E. E. GILLENWATERS, J.

The evidence in the case of Wilson Johnson was as follows: "I bought some liquor of the defendant on the 13th day of May, 1871. It was on the day of an election. I got the liquor from the defendant at his house, where he kept it to sell; he lived about one mile, or one mile and a quarter from the election ground; got some liquor in the morning and some in the evening. Got the liquor in the morning, and went to the election ground; when he got there the polls were open, but could not say whether they were when he bought the liquor; stopped on the way.

Attorney General HEISKELL, for the State.

TURNEY, J., delivered the opinion of the Court.

By statute of 1869–70, c. 22, s. 4, it is enacted "That no liquor shop in this State shall be kept open on election days, nor shall any person, on said days, give or sell intoxicating liquors to any person, for any

purpose, at or near an election ground:" Shankland's Stat., 108.

By s. 3, c. 53, of Acts of 1869–70, "That all persons convicted under the 4th section of Acts of 1869–70, c. 22, passed December 1, 1869, of which this is amendatory, shall be punished by fine of not less than twenty-five dollars nor more than one hundred, or by imprisonment in the county jail at the discretion of the court: Sec. 4. That the word 'day,' in the act which this is intended to amend, shall mean from sunrise to sunset:" Shank. Stat., 109.

The purpose of these enactments is, to preserve good order and conserve peace. To make these objects more certain of attainment the expression "at or near an election ground," is used. If the giving or selling is not at the election ground, but at a place not distant or remote, but of reasonably easy or convenient access, the party so giving or selling is guilty.

In this case, the offense was committed within a mile and a quarter, either distance being *very certainly* within the scope of the operation of the statute.

A contrary holding would make the law a dead letter on the statute book, as it would authorize parties to constantly violate it by removing to a distance of one, two, or even more miles, and then sell or give intoxicating liquors to persons attending, or proposing to attend elections, who could and would, by joint contributions, get up joint-stock jug-groceries, thus keeping down a scantiness in supply of the exhilarating as well as warlike fluid, as has been often done, in violation of the "Camp Ground" law.

Lewis Hill *v.* The State.

As the transcript fails to bring up the judgment of the Circuit Court, we can only announce the principle decisive of the question presented, leaving the case with the ccurt below.

LEWIS HILL *v.* THE STATE.

1. INDICTMENT. *Rape. Averment of sex.* An indictment for rape need not state by express averment that the person injured was a female. The feminine pronoun "her," sufficiently indicates the sex.
2. SAME. *Same. Averment of age.* An indictment for rape need not state that the party injured was over the age of ten years.
3. ERROR. *Effect of verdict.* After verdict in a case of felony, the court must see that the verdict is erroneous, before they will reverse on the facts.[1]

FROM GREENE.

Circuit Court, October Term, 1871, before E. E. GILLENWATERS, J.

H. H. INGERSOLL, for the prisoner.

Attorney General HEISKELL, for the State, cited 2 Archb., 304, where the form is the same, except that

[1] See acc. *Kirby* v. *State*, 3 Hum., 289, 304; *Henry* v. *State*, 4 Hum., 270, 262; *Leake* v. *State*, 10 Hum., 144; *Jones* v. *State*, Feb. 10, 1872, *post.*

the addition "spinster" is there given. That being merely a feminine termination, is not a more satisfactory indication of sex, than "her" and the feminine name Sarah. And see *Ib.*, 159, and cases in note. Ravish is technical, *Ib.*, 159. Indictment is good at common law: Code, 5119.

FREEMAN, J., delivered the opinion of the Court.

This is an indictment for rape, alleging "that Lewis Hill, (colored,) late of said county, (of Greene,) on the 12th day of July, A. D., 1871, as to-wit in the county aforesaid, unlawfully, forcibly, violently and feloniously did make an assault upon one Sarah M. Malone, in the peace of the State then and there being, and he, the said Lewis Hill, did then and there unlawfully, forcibly and feloniously have unlawful carnal knowledge of her, the said Sarah M. Malone, against the will of the said Sarah M. Malone."

The jury convicted the said Hill, and he was sentenced to 18 years' confinement in the Penitentiary. He filed reasons in arrest of judgment, which are now insisted on for reversal here.

The first is, "that the indictment is defective, and bad in this, that it does not show that the person on whom the offense is alleged to have been committed, was a female.

Rape is defined by the Code, § 4610, to be the unlawful carnal knowledge of a woman forcibly and against her will. Section 4611 is, whosoever is convicted of the rape of any female of the age of ten years or upwards,

shall undergo imprisonment in the Penitentiary not less than ten nor more than twenty-one years. We have no question that the indictment sufficiently charges the fact, that the party injured was a female, as the pronoun, her, distinctly indicates the sex.

The second objection is, "The indictment is uncertain and bad in this, that it does not show that the person on whom the offense is charged to have been committed, was a female over the age of ten years.

We do not think this objection is tenable. It is true, the offense of unlawfully and carnally abusing a female child under ten years of age, is not rape, but only punishable as rape: Code, sec. 4614; but the offense alleged in this indictment, is the having unlawful carnal knowledge of Sarah Malone. This is a charge of a rape upon her in clear and unmistakable language. If the party was under ten years of age, it would be matter of defense, and might be shown by defendant as such. It certainly can not be maintained, that an indictment shall negative all the grounds of defense that might be presented by defendant, or negative the commission of any other offense of similar character. It need only affirmatively charge facts that make out, if proven, the offense of which the party is sought to be convicted.

This indictment would have been good at common law; see Waterman's Archb., vol. 2, 304; and the Code does not on any sound principle of construction, change the allegations required in such cases.

It is next insisted, that the case should be reversed on the facts. After careful examination of the facts of

the case, we do not feel authorized to disturb the verdict on this ground. It is true, the principal witness, Miss Malone, is shown to be of bad character and unworthy of credit; but, on looking at the testimony, she is corroborated in her statement, by the fact, that, in a very short time after the occurrence, she told of the outrage—told of the time and place—and pointed out the marks on her throat, where the print of fingers were still seen by the witnesses, with scratches, the blood still oozing out of them, in the language of one witness. In addition to this, in a short time, she sought a warrant for arrest of the defendant.

The verdict of a jury in a case of felony, raises a presumption of guilt against the prisoner, and we must see that the verdict is erroneous, before we can reverse on the facts.

A jury with the witnesses before them, under a proper charge of the court, have found the defendant guilty, and we can not see from the proof in this case, that they have erred in their conclusion.

The case will be affirmed.

3 Heis 321
110 485

JOHN MIKELS v. THE STATE.

1. FORMER CONVICTION. *Of A. & B. before J. P. no bar to charge of felony.* A plea of former conviction before a Justice of the Peace, under the small offense law, is not a good bar to an indictment for felonious assault.

2. SAME. *Same. Verdict of not guilty of felony.* Such a plea being put in, and held bad on demurrer, a defendant pleaded not guilty, and was convicted of assault and battery; held that the conviction was good.

3. SAME. *Same. How pleaded.* In such case the defendant should have pleaded not guilty to the felony, and former conviction to the assault and battery.

Case overruled. *Hodges* v. *The State*: 5 Cold., 7.

FROM KNOX.

Circuit Court, November Term, 1870. O. P. TEMPLE, Ch., presiding by interchange.

W. A. HENDERSON, for the defendant, insisted that if a man be convicted for an offense, included in a greater offense, he could not afterwards be tried for the greater offense; as the lesser being included in the greater, must be punished with it, which would be a double punishment as to the lower offense. Cited 1 Bishop, § 838, 884, 889, 892, note 2; 1 Chit. Cr. L., 458, 486; 1 Whar. Am. Cr. Law, § 563, 565.

Attorney General HEISKELL: A party brought before a J. P., is never in jeopardy at all. He can not be convicted except on his submission. There is no trial. It differs from the proceeding by indictment.

There the State elects for which offense to proceed. The State severs the offense. Under the small offense law, the act is that of the defendant, and he acts at his peril. The idea that by submitting before a J. P. for A. & B., and having a fine assessed, a bar can be raised to an indictment for murder, presents the logical result of the principle contended for.

NICHOLSON, C. J., delivered the opinion of the Court.

At the June Term, 1869, of the Circuit Court for Knox county, John Mickels was indicted for an assault with intent to commit murder. At the November Term, 1870, "defendant, by his counsel, entered a special plea of *autre fois convict*, to which the Attorney General demurred, which was argued by counsel and considered by the court; which demurrer was sustained."

The plea states that, "on the 17th day of May, 1869, before F. A. Armstrong, Esq., then an acting Justice of the Peace for the county of Knox; the said defendant having theretofore been regularly arrested upon a State warrant, upon a charge of an assault and battery theretofore committed on the body of Wm. Morrow, he, the defendant; was regularly brought and arraigned, the said Wm. Morrow having been duly notified, and that defendant entered his plea of guilty of said charge; whereupon the magistrate heard the evidence, and fined defendant four dollars and costs, which defendant has paid; and he says he is the same person so fined, and that the said assault and battery, of which he was so arraigned and convicted, and the offense for which he is now pros-

ecuted in said indictment for felonious assault, are one and the same offense, and this he is ready to verify."

The Attorney General demurred to this plea, and the demurrer was sustained. Defendant was then tried on his plea of not guilty, and was acquitted of the felonious intent, but convicted of assault and battery, and fined twenty-five dollars, and has appealed to this court.

The indictment for assault with intent to murder, embraces two distinct offenses: an assault and battery, simply, and an assault with felonious intent; and under our laws the jury may acquit of the higher and convict of the lower, as they did in this case. But it appears by the plea of defendant, that he was convicted and punished for the lower offense by a Justice of the Peace, and he relies on this conviction by the Justice of the Peace as a bar to the prosecution for the higher offense.

The Circuit Judge sustained the demurrer to this plea, and we think correctly. If he had confined his plea to the simple assault and battery, and put in the plea of not guilty to the higher offense, his plea of former conviction would have been a bar to any other prosecution for the assault and battery, but would not have been a bar to the prosecution for the felony. The defendant's plea having been defective and demurrable, and he having then gone to trial on the plea of not guilty, he could not, after the verdict of guilty of the assault and battery, avail himself of the fact that he had been convicted of the same offense by the Justice of the Peace. He could make this defense only by a proper plea; and having failed to do so, the judgment on the verdict was correct.

In the case of *Hodges* v. *The State*, to an indictment

for an assault with intent to commit murder, the defendant pleaded as to the felony, "not guilty," and in bar of a conviction for an assault and battery, a former conviction before a Justice of the Peace under the small offense law. In that case, this Court held, that the plea of former conviction should have been demurred to; but under the instructions of the court, which were certainly correct, the jury were directed to disregard it, and the verdict was found on the issue of not guilty; and we see no reason to disturb it."

We can not concur in that ruling. We think the plea as to the former conviction before a Justice of the Peace, for the assault and battery, was a good bar to another prosecution for assault and battery in the Circuit Court; and that it was not proper for the Circuit Judge to direct the jury to disregard it.

Our opinion is limited to the effect of a former conviction before a Justice, of the assault and battery. We give no opinion as to what would be the effect of a conviction in the Circuit Court for an assault and battery upon a subsequent indictment, for the same assault, with felonious intent.

In the present case, we affirm the judgment, because the plea of former conviction was not properly pleaded.

NELSON, J., delivered the following opinion dissenting from the majority of the Court:

The plaintiff in error was indicted for an assault with intent to commit murder in the first degree, by means of "certain dangerous weapons, to wit: rocks,

stones and clubs; and, on his trial, was acquitted of the felonious intent, and found guilty of assault and battery. He was fined twenty-five dollars, and sentenced to five days' imprisonment in the common jail of Knox county, and appeals from this judgment.

In connection with his plea of not guilty, the plaintiff in error filed a plea of *autre fois convict*, the substance of which is, that he had been arrested upon a State's warrant, and tried and fined by a Justice of the Peace, for an assault and battery, which he avers to be the same offense as the felonious assault charged in the indictment. He avers that the person upon whom the assault was committed was duly summoned as a witness, and that the justice heard the evidence. He also avers that he pleaded guilty, and has paid the fine and costs, &c.

The Attorney General for the district filed a special demurrer to the plea, which was sustained, and the plaintiff in error was afterwards tried upon the plea of not guilty.

The causes of demurrer are: 1. That a Justice of the Peace has no jurisdiction to try, or otherwise dispose of, felonies. 2. That the offense can not be punished by fine. 3. That the plea sets up, in bar of a prosecution for a felony, a trial for a misdemeanor.

It is now insisted by the Attorney General for the State, that the action of the Criminal Court of Knox county is sustained by *Hodges* v. *The State*, 5 Cold., 7. That case was similar to this, with the exception that, instead of a demurrer to the plea, there was a replication averring that the proceedings before the Justice

were in fraud of the law, and the jury were directed to disregard the plea.

There can be no doubt that, where the conviction before the Justice is resorted to in fraud of the law, and for the purpose of evading a criminal prosecution in court, it can not be pleaded in bar: *State* v. *Lowry*, 1 Swan., 35; *State* v. *Colvin*, 11 Hum., 599. Nor can there be any doubt that, in view of the danger of abuses under the statute, which is familiarly designated "the small offense law," this court has required much strictness in the plea of former conviction: *State* v. *Atkinson*, 9 Hum., 677; *State* v. *Spencer*, 10 Hum., 431; *State* v. *Epps*, 4 Sneed, 552. But, where the offense was the same, the plea was held good, and it was adjudged that if the State intends to rely on fraud or collusion to avoid the force of the plea, it must be by replication: *State* v. *Clenny*, 1 Head., 272.

The case of *Hodges* v. *The State*, rests upon the assumption that the jurisdiction of Justices is limited to misdemeanors, and does not extend to offenses of the grade of felony; and if, after judgment has been pronounced against a defendant by the Justice for a misdemeanor, an indictment is afterwards found in court upon the same facts for a felony, the simple circumstance that the indictment assumes such a shape precludes him from relying upon the plea of former conviction. If this is so, no conviction before a Justice could be rendered available as a defense. Any assault, or assault and battery, could be treated as a felonious assault, and the defendant would then be deprived of the benefit of his plea, and could be twice tried and punished for the

same offense. And this was so, in point of fact, in *Hodges* v. *The State*, as it may be fairly inferred from the opinion, that he pleaded guilty to, and was fined for, an assault and battery by the Justice, and was afterwards convicted and fined for the same identical offense in the Circuit Court. His acquittal of the felonious intent was a legal determination that he was not guilty of a felony, and his conviction of the assault and battery an adjudication that he was guilty of a misdemeanor, as the Justice had decided.

There can be no question that it was not the intention of the Legislature to confer upon a Justice of the Peace any jurisdiction to hear and finally determine cases of felony. In such cases, the Justice, under our statute, as at the common law, makes only a preliminary examination and binds the party over to court, if there is probable cause to believe the defendant guilty. See Code, 5064. But in felonies as well as misdemeanors, the power of judicial determination is, to a certain extent, vested in the Justice. If he is satisfied no offense is committed, he is to discharge the defendant. If it appear that an offense has been committed, and there is probable cause to believe the defendant guilty thereof, he admits the party to bail, if the offense is bailable, or commits him to prison to answer the charge in court, if it is not. Code, 5052, 5063, 5064.

In like manner, he exercises the right of judicial determination under the small offense law. For, it is essential that, "If the offense merit a fine exceeding fifty dollars, or imprisonment, or fine of any amount, or imprisonment alone; or if the offense is punishable by

both fine and imprisonment, the Justice shall not render judgment against the offender under the foregoing provisions, but shall bind the party to appear at the next Circuit or Criminal Court:" Code, 5001. Can any other person than the Justice determine, under this section, whether the party shall be bound to appear at court? The statute assumes that the Justice is capable of deciding whether the offense merits a fine exceeding fifty dollars, or imprisonment, or both. It assumes that he knows whether the law punishes by fine and imprisonment. In such cases, he is not to pronounce final judgment; but he, and he alone, can determine whether the cases are of that description or not. Suppose he fines a defendant fifty dollars for an assault and battery, and the party should be afterwards indicted for the same offense, can the jury impose a fine of one hundred dollars, or any greater amount? If they can, then the defendant can be twice tried and punished for the same identical offense. Such was not the intention of the Legislature. If Justices are presumed to have sufficient intelligence to determine, in the most important causes, at least in a preliminary investigation, that an offense is, or is not, bailable, was it not the intention that they should finally determine whether the offense charged and made out in evidence, falls within the class of small offenses? Such a power of determination clearly exists where the warrant charges a misdemeanor only; but if the warrant charges a felony, then the power to decide whether a smaller offense is included in the felony, and to punish it as such, rests with the courts, and not with the Justices. But, collusion and fraud aside, how can it be said that

the proceeding before a Justice is a nullity for want of jurisdiction, when the warrant under which he acts shows a case within his jurisdiction? *Prima facie*, a plea which shows that the Justice had jurisdiction, is a bar to an indictment which the plea avers to be for the same offense; and if the plea is untrue, the only mode of demonstrating its falsity is to file a replication distinctly showing how the two offenses are not identical, and in what manner the jurisdiction was exceeded, and to establish the facts by evidence.

If, therefore, a Justice decides upon a warrant for an assault and battery, that the defendant is guilty, and fines him accordingly, the defendant can not be, afterwards, lawfully put upon his trial for the same assault and battery with a felonious intent.

This view is sustained by cases of high authority. In England, it was held that a prisoner who had been convicted, summarily, of a common assault, before two Justices, could plead *autre fois convict* to an indictment for feloniously stabbing, under 9 Geo. IV., c. 31, the circumstances out of which the charge arose being the same in both cases: Roscoe's Crim. Ev., 6th Am. ed., by Sharswood, 187. In Massachusetts, it was decided that "a plea of former acquittal of the defendant for an assault and battery, by a Justice of the Peace, was held a sufficient bar to an indictment alleging the same offense, with the additional aggravating circumstance of the complainant's life having been thereby endangered." *Commonwealth* v. *Cunningham*, 13 Mass. Rep., 245; 1 Wat. Arch. Cr. Pl., 366. A man indicted and acquitted, or convicted of a greater offense, can not be afterwards indicted

and convicted a smaller offense included in it; as, for manslaughter, after a conviction or acquittal for murder; for larceny, after a trial for burglary and larceny; for assault and battery, after a trial for riot and assault, and the like. See *Slaughter* v. *State*, 6 Hum., 410; 1 Chit. Cr. Law, Riley's ed., 376, 377; 1 Wat. Archb. Cr. P., 361, 367, 373; *Commonwealth* v. *Kinney*, 2 Virg. Ca., 367; *Campbell* v. *The State*, 9 Yer., 333; *Esmon* v. *The State*, 1 Swan., 14; *Major* v. *The State*, 4 Sneed, 608. So a man indicted and acquitted for a misdemeanor, which, upon the trial, appears to be a felony, can not afterwards be indicted for the felony: Bishop's Cr. Law, 3d ed., § 889; *State* v. *Chaffin*, 2 Swan, 493; *Fidler* v. *The State*, 7 Hum., 508; Wharton's Cr. Law; 1 Wat. Archb. Cr. P., 361; *State* v. *Shepard*, 7 Conn., 56; *Commonwealth* v. *Miller*, 5 Dana, 320. This general rule would not apply in cases of homicide; for, if the death of the party slain occurred after the conviction for assault and battery which brought about that result, this would be a new fact in the case, and would make a wholly different offense: 1 Bishop's Cr. Law, 3d ed., 890. If a Judge direct the jury to acquit a prisoner on any ground, however fallacious, and it is done accordingly, he is entitled to the benefit of the verdict: *State* v. *Norvell*, 2 Yer., 24; *Slaughter* v. *The State*, 6 Hum., 414.

It may be proper to observe, that our statute as to the trial of small offenses, before Justices, is similar to the statute 9 Geo. IV., c. 31, s. 27, 1 Russ. on Cr. L. 5th Am. ed., 760, 761; and, notwithstanding the criticisms upon the act of 10th January, 1848, c. 55, for the punishment of small offenses, it was, with subse-

quent statutes amendatory thereof, substantially re-enacted in the Code, 4994, 5003. And, although there may be occasional abuse, or misuse, of the statute, through corruption or ignorance, the spirit of the Constitution requires that no man shall be twice tried and convicted for the same offense.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE,.....DECEMBER TERM, 1871.

WOODFOLK LEWIS *v.* THE STATE.

1. VENIRE FACIAS. *Signed by Judge.* A *venire facias* issued and signed by the Judge of the Criminal Court of Montgomery county, under the Act of July, 1870, c. 115, to create that court, is good.
2. INDICTMENT. *Description of U. S. notes, &c.* In an indictment for larceny, the description of the articles stolen, as "One five and one two dollar greenback bill United States currency National Bank bills and money," is bad.

Cases cited: *Longbottoms* v. *The State*, 11 Hum., 39; *Pyland* v. *The State*, 4 Sneed, 357; *Baldwin* v. *The State*, 1 Sneed, 413; *Fanny Merritt* v. *The State*, MS., Nashv., 1870.

FROM MONTGOMERY.

Criminal Court, September Term, 1871, before T. W. KING, J.

JAS. M. QUARLES, for the prisoner, cited 11 Hum., 39; 4 Sneed, 357; 2 Wat. Archb., 356–7, and notes;

Com'l v. *Smith*, 1 Mass., 245; *Wilson* v. *State*, 1 Porter, 118; 1 Archb., 283; *Kit* v. *State*, 11 Hum.; *Hope* v. *Com'l*, 9 Metc.

Attorney General HEISKELL, for the State.

McFARLAND, J., delivered the opinion of the Court.

The plaintiff in error was convicted of petit larceny in the Criminal Court of Montgomery county. His motions for a new trial, and in arrest of judgment, were overruled, and judgment pronounced upon the verdict; from which an appeal in error has been prosecuted to this court.

The first question presented by the counsel for the prisoner, is, as to the sufficiency of the *venire facias* for the panel out of which the grand jury were empaneled.

The Act of July, 1870, creating the Criminal Court of Montgomery, provides, that the judge holding said court shall have power, from time to time, to appoint a grand jury and two petit juries to attend its regular and special terms; and Section 11 says that the Judge of said Criminal Court shall not only appoint the grand jury and petit juries for said court, and cause a *venire facias* to be issued to the sheriff of said county, but shall have power at any time that it may be necessary to cause to be summoned other persons to serve as jurors in said court.

The only objection made, is, that the *venire* in this cause is issued and signed by the judge himself, when it should have been issued and signed by the clerk.

The argument is, that by law it is made the duty of the Clerk of the County Court, in counties where there is no special act of this character, to issue the writ for the panel designated by the justices; and by this act, it was intended that the judge should perform the duty simply of designating the names of the jurors, leaving the clerk to issue the writ as before.

Under the provisions of the Code, Section 5242, this court could not arrest the judgment, if the *venire facias* had been entirely omitted from the transcript.

We are not prepared to say that this *venire facias* is in any respect defective. It would seem to be rather sticking in the bark to hold that the judge may cause that to be done through the clerk, who, in this respect, is a mere ministerial officer, which he could not directly do himself.

We think the objection is purely technical and without substance, and that it can not prevail at this day.

The next question is, as to the sufficiency of the indictment. The charging part is in these words: "That Woodfolk Lewis, on the 20th day of May, 1871, in the State of Tennessee, and county of Montgomery aforesaid, feloniously took and carried away one five and one two dollar greenback bill United States currency, National Bank bills, and money, of the goods and chattels of Dan Kelly, and of the value of seven dollars," &c. It can not be denied that the technical strictness that formerly prevailed in criminal proceedings was often carried to extreme lengths. The tendency of modern legislation, as well as the recent rulings of this court, has been to ignore many of these mere forms and technicalities, and

not to encourage the discharge of criminals from punishment upon flimsy and unsubstantial objections.

We must be careful, however, that this reform, which certainly is to be commended, be not carried to the other extreme.

The Constitution provides, "that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment. That the accused has a right to demand the nature and the cause of the accusation against him, and to have a copy thereof." The question is, what is a compliance with these constitutional guaranties? The Code 5114 provides, "that the statement of facts constituting the offense in an indictment, shall be in ordinary and concise language, without prolixity or repetition."

It has always been held, that the statement of facts in the indictment should conform to the substantial requirements of the science of pleadings, which is a part of our common law. Does this indictment meet these requirements—is it a single and concise statement of the nature of the accusation? We think not. "One five and one two dollar greenback bill, United States currency National Banks bills, and money." Can it be determined from this statement, with reasonable certainty, what it is that is charged to have been stolen? Certainly greenback bills, United States currency, National Bank bills, and money, can not all mean the same thing; and to charge in the same count that a bill is a greenback bill, United States currency, National Bank bill, is certainly indefinate and uncertain in its description of the articles said to have been

stolen; nor can this defect be cured by rejecting as surplusage a part of this charge, so as to render intelligible that which remains. We could not determine what part to reject. A proper administration of the law requires that we shall preserve the substance of the law of criminal pleadings. We have no case directly upon this point, but this view we think is sustained by the general principles of the cases of *Longbottoms* v. *The State*, 11 Hum., 39; *Pyland* v. *The State*, 4 Sneed, 357; *Baldwin* v. *The State*, 1 Sneed, 413, and the unreported case of *Fanny Merritt* v. *The State*, decided by this court at December Term, 1870.

We are not to be understood as holding that the indictment should give an exact description of the bills alleged to have been stolen; this would often be impracticable, and it has been held that an indictment charging the stealing of valuable bank notes is sufficient; but we think the indictment should designate the articles alleged to have been stolen with reasonable certainty, whether bank notes or anything else.

We are, therefore, constrained to arrest the judgment, but the prisoner will be held in custody, and remanded for another indictment.

DICK WHITE *v.* THE STATE.

1. VENIRE FACIAS JURATORES. *Not process.* A *venire facias juratores* is not process within the meaning of the Constitution, Art. 6, s. 12, and may be issued and signed by the judge of a court who is authorized to appoint the jurors, and "to cause them to be summoned."
2. CONFESSIONS. *Discovery in consequence of. Rule as to.* A confession induced by improper means, may be used to the extent of showing that the prisoner had knowledge of the facts, to the discovery of which his confession has led; but his statements as to his connection with the facts as a participator in the crime, are not admissible against him. His knowledge of the facts puts it upon him to reconcile his knowledge with his innocence.

Case cited: *Deatheridge* v. *The State*, 1 Sneed, 75.

FROM MONTGOMERY.

Criminal Court, June Term, 1871. T. W. KING, J.

JAS. M. QUARLES, for prisoner, cited: As to foreman of grand jury, 9 Yerg., 325; 8 Yer., 166. Examination before J. P.: 2 Swan, 581. Confessions, 2 Cold., 223; 5 Cold., 300.

Attorney General HEISKELL, for the State.

SNEED, J., delivered the opinion of the Court.

The prisoner appeals in error from a judgment of the Criminal Court of Montgomery, upon a conviction of larceny.

Upon the argument here, it is assigned as error,

that the record shows the appointment of one Henry Lyle as foreman of the grand jury, whereas the indictment is indorsed as a true bill by J. B. Taylor, as foreman of the grand jury.

A supplemental transcript has, however, been produced, which shows that the said Henry Lyle did not serve, after his said appointment, and that the court had appointed the said J. B. Taylor, foreman, who, upon the finding, indorsed the indictment, as aforesaid.

It is assigned as error, also, that the *venire* from which the grand jury was selected, was issued by the judge of said court under his own signature, and not by the clerk under the order of the court. The fifth section of the act of 1870, c. 115, creating the Criminal Court of Montgomery, provides that the judge of said court shall, from time to time, appoint a grand jury and two petit juries to attend its regular and special sessions. The eleventh section provides, that the judge of said court shall not only appoint the grand and petit juries for said court, and cause to be issued a writ of *venire facias* to the sheriff of said county, but shall have power at any time that it may be necessary, to cause to be summoned other persons to serve as jurors in said court.

The ordinary *venire facias*, according to the English practice, was a writ used commanding the presence in court of a party indicted of any petty misdemeanor. That kind of writ was process; but the *venire facias juratores* is not process in the sense of the Constitution of the State, which requires that all writs and other process shall run in the name of the State, and bear teste

and be signed by the respective clerks. Original process, in the sense of the Constitution, is the means of compelling a defendant to appear in the court after suing out the original writ in civil, and after indictment in criminal cases. By final process, the judgments of courts are executed: 2 Bouv. L. D., 379. The only object of requiring process to be signed by the clerk, is, to give it the stamp of judicial authority. The Legislature would certainly not have the power to vary the mode of attesting process in its technical sense, as required by the Constitution; but all precepts from courts of justice, other than such process as is contemplated in the Constitution, is under the legislative control. The *venire facias juratores* being a mere designation of the persons appointed by the court to act as a jury, may as well be issued under the signature of the judge of the Criminal Court of Montgomery under this act, as under the signature and attestation of the clerk. Such an attestation by the judge, would surely give no less credit and verity to the precepts than that of the clerk. The powers conferred upon the judges by this act in reference to the organization of the jury, are very ample. He is required in one section to appoint the grand and petit jury, and in another, he shall not only appoint, but cause the *venire facias* to issue to the sheriff; and the power is given him at any time that it may be necessary, to summon other persons to serve as jurors. These provisions are very comprehensive. The formal issue of a *venire* may not always be necessary. A mere designation of the persons by the court, and his verbal order to the sheriff at any time to sum-

mon them, would, under these provisions, seem to be allowable. We are of opinion that the mode adopted by the court in this case for organizing the grand jury, can not affect the validity of the indictment.

It is insisted by the prisoner in this case, that his confessions of guilt were extorted by improper influences, and that they were improperly admitted in evidence against him. And the majority of the court is of this opinion. While it is conceded that the testimony as to facts discovered by the confession is proper, and that facts so discovered by the confession, and proven by extraneous evidence to exist, are admissible; yet it is contended, that, if such confession is improperly obtained, no part of it except its disclosure of such facts, is competent evidence. And such is the law. If a prisoner, under the influence of hope or fear, confess himself guilty, and state certain facts connected with the commission of the offense, which are otherwise shown to be true, these facts may be given to the jury as detailed by the confession or as a part of it; but the confession of guilt must be excluded. The prisoner is left, then, to reconcile his knowledge of these facts, with his innocence of the crime: *Deathridge* v. *The State*, 1 Sneed, 75; *King* v. *Warickshall*, 1 Leach, 298; *King* v. *Lockhart*, *Id.*, 430.

Let the judgment be reversed, and the prisoner be remanded for a new trial.

Tom Floyd *v.* The State.

Assault to Murder. *Lying in wait. Evidence.* On an indictment for an assault with intent to commit murder in the first degree, it is error to charge that an assault by "lying in wait," is as matter of law, deliberate, &c. It is evidence of deliberation, &c., but the deliberation, &c. is not a conclusion of law, but a question of fact.

Cases cited: *Riley* v. *The State*, 9 Hum., 646; *Dains* v. *The State*, 2 Hum., 439; *Davidson* v. *The State*, 9 Hum., 455.

Code cited: 4598. Construed: 4626.

FROM MONTGOMERY.

Criminal Court, Nov. Term, 1871. T. W. King, J.

John F. House was assigned by the Court to defend the prisoner.

James M. Quarles, with the Attorney General, for the State.

McFarland, J., delivered the opinion of the Court.

The prisoner was indicted and convicted in the Criminal Court of Montgomery county, for a felonious assault upon Jesse Allensworth, with intent to commit murder in the first degree; and his motions for a new trial and in arrest of judgment were overruled, and judgment rendered upon the verdict, sentencing him to 21 years' imprisonment in the Penitentiary; and from this judgment he has appealed. The proof shows that the prosecutor was driving along a public highway in his

buggy, when the prisoner suddenly came out from a thicket at the side of the road, and assaulted the prosecutor, first jerking him out of his buggy, and then striking him with a stick, and then stabbing him with a knife.

The Circuit Judge, in his charge to the jury, among other things, uses the following language: "If you find from the testimony, that the defendant was lying in wait for the purpose of making an assault and battery upon the prosecutor with a deadly weapon, then the law infers that said assault and battery was made with intent to commit murder in the first degree, and if death ensue, it would be murder in the first degree; if death do not ensue, then it would be an assault with intent to commit murder in the first degree."

Section 4598 of the Code, defines murder in the first degree in these words: "Every murder perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or committed in the perpetration of, or attempt to perpetrate any arson, rape, burglary, robbery or larceny, is murder in the first degree."

Section 4626, under which this indictment was found, is in these words: "Whoever shall feloniously, and with malice aforethought, assault any person with intent to commit murder in the first degree, or shall administer or attempt to give, any poison or potion for that purpose, though death shall not ensue, shall, on conviction, be imprisoned in the Penitentiary not less than three nor more than twenty-one years." It has been held, and admits of no doubt, that, in order to sustain

a conviction under this section, it must appear that the assault was of such a character, and made under such circumstances that had death ensued, the accused would have been guilty of murder in the first degree: *Dains* v. *The State*, 2 Hum., 439; *Davidson* v. *The State*, 9 Hum., 455. But from this it does not follow, that in every case where the accused would be guilty of murder in the first degree if death ensue, he will therefore be guilty of an assault with intent to commit murder in the first degree, in the meaning of section 4126, if death do not ensue. To illustrate, by the express provision of section 4597, a murder committed in the perpetration of, or attempt to perpetrate a robbery, is murder in the first degree. And in such a case, it is not necessary to show the deliberation, and premeditation, required to make out murder in the first degree, when committed by the ordinary means; but, in such a case it is only necessary to show, that the murder was committed in the perpetration of, or attempt to perpetrate robbery. Yet, in such a case, if death do not ensue from the injuries inflicted, it is not an assault with intent to commit murder in the first degree, but an assault with intent to commit robbery, a separate and distinct felony, under a different section of the Code. So again, if an assault is made with intent to commit rape, if death ensues, under such circumstances as to make it murder, it is murder in the first degree, by the express enactment above set forth. Yet, if death do not ensue, it is not an assault with intent to commit murder in the first degree, but an assault with intent to ravish, a separate and distinct felony.

Tom Floyd *v.* The State.

A murder perpetrated by lying in wait, is a murder in the first degree; and if the fact of lying in wait be proved, and the killing be of such a character as to constitute murder, then it is murder in the first degree, without any proof of deliberation or premeditation. The fact of lying in wait is, of itself, made the evidence of the premeditation and deliberation: See *Riley* v. *The State*, 9 Hum., 646. If the murder, however, be by the ordinary means, the deliberation and premeditation must appear from the proof. The question is, what is the result, where the assault is made by lying in wait, but death does not ensue? Does the proof of the assault and lying in wait make out the case?

It will be observed, that section 4626 does not include in this felony every case which is made murder in the first degree, under section 4598, in the event death ensues. It does not, as we have seen, include cases where there has been a commission, or an attempt to commit robbery, rape, arson, burglary, or larceny; nor does it include the case of lying in wait. It does expressly include cases where poison is administered or attempted to be given for the purpose of murder; and we understand this section to include two classes of cases: that is, 1st, where poison is administered or attempted to be given for the purpose of murder. In such a case, no proof of deliberation or premeditation is necessary. Next, a felonious assault with intent to commit murder in the first degree. And in every case under this section, except in the case where poison is given, or attempted to be given, the deliberation and premeditation must be proved. In a case where the assault is per-

petrated by lying in wait, the fact that the accused is lying in wait, may undoubtedly be considered by the jury as evidence of deliberation and premeditation.

Yet, it does not result as a conclusion of law, as it would in case of murder, that the assault was with the deliberate and premeditated purpose of committing murder in the first degree, but this is a question of fact, upon all the evidence.

As we have seen, if in such a case, where the lying in wait is shown, and death ensues, under such circumstances as to constitute murder, it is murder in the first degree, as a conclusion of law. Yet, if death does not ensue, the fact of lying in wait does not, as a conclusion of law, make it an assault with intent to commit murder in the first degree. This difference appears in the statute, and the reasons are obvious; for, while it may be fairly said that every willful murder committed by lying in wait, is a deliberate and premeditated murder; yet, it does not follow, that every assault made by lying in wait, is made for the deliberate and premeditated purpose of committing murder. Tested by these principles, it results that the instructions of the Circuit Judge are erroneous. He says to the jury: "If you find from the testimony that the defendant was lying in wait for the purpose of making an assault with a deadly weapon, the *law infers* that said assault and battery was made with the intent to commit murder in the first degree; and if death do not ensue, then it would be an assault with intent to commit murder in the first degree."

This makes the lying in wait with a deadly weapon

conclusive of the deliberate and premeditated purpose to commit murder in the first degree; whereas, it was not a conclusion of law, but a question of fact, to be left to the jury upon all the evidence. And further, it makes the test whether this was an assault with intent to commit murder in the first degree, depend upon whether it would have been murder in the first degree had death ensued, and in arriving at this conclusion, the jury were to be governed by the same rule. This, as we have seen, is erroneous.

The use of a deadly weapon implies malice, at common law, but does not imply that the act was done with deliberation and premeditation necessary to constitute murder in the first degree: *Dains* v. *The State*, 2 Hum., 439. It is not necessasy to notice the other objections taken to the charge.

For the error indicated, the judgment must be reversed, and a new trial awarded.

Richard Dove *v.* The State.

Richard Dove *v.* The State.

1. Criminal Court of Montgomery. *Judge may certify transcript to.* An act establishing the Criminal Court of Montgomery county, requires the *Circuit Court* to certify to the Criminal Court, transcripts, &c., and the Criminal Court to enter the transcripts on the minutes; and enacts that the entry of record shall give to said Court jurisdiction, &c. Held that a transcript certified by the Circuit Judge, entered of record, &c., gave the court jurisdiction.

2. Objection. *What waived by plea.* If any exception could have been taken, it was waived by plea of *not guilty*.

3. Prosecutor. *Omission to mark. What is.* Where an indictment is marked, "no prosecutor necessary," evidently because there was a coroner's inquest and verdict; held, that the want of a prosecutor was cured by the Code, 5242, though the inquest was not sufficient to authorize the indictment.

4. Insanity. *Practice. Hypothetical case. When to be submitted.* It is not error for the court, on a trial for murder, where insanity is set up as a defense, to require the defendant to submit his hypothetical case to his professional witnesses, before the rebutting evidence of the State is heard on the question of insanity. If evidence materially varying the hypothetical case, is afterwards introduced, the defendant must ask leave to re-examine as to the new matter.

5. Error. *Must be material.* If the new proof does not make any change in the hypothetical case submitted, the defendant would not be injured by the refusal.

6. Witness. *Competency. Proof of.* The State introduced a witness not bearing the name of the defendant, and the defendant objected to her competency, that she was his wife; but refused to examine her on her *voir dire*, and objected to her examination by the State. Held, that an offer to prove marriage "by reputation, cohabitation, conduct, and acknowledgment of the parties that they were man and wife," was properly refused. The defendant was bound to produce the best evidence, or account for its absence.

7. Same. *Same. Error in admitting, must appear.* The exclusion or admission of the witness being a matter for the court, this court would not reverse, where upon, the whole case, they were satisfied that the witness was not the defendant's wife, though there was no direct evidence on that point.

Richard Dove *v.* The State.

8. INSANITY. *Opinions of unprofessional witnesses.* Unprofessional witnesses may be asked, after giving the circumstances and conduct of the party, to state their opinion as to his sanity; and the exclusion of such evidence offered by a defendant, is error.

9. ERROR. *In charge. Plea, for defense.* It is not error for the court, in his charge, to speak of the defense of insanity set up, as, a plea of insanity put in.

10. SAME. *As to matter not controverted.* In a case where the killing is proved beyond question, for the judge to change the jury that the plea of insanity put in, (the defense of insanity,) was an admission of the killing, is not error.

11. INSANITY. *Quantum of proof. Doubts.* A charge that "the proof of insanity must be as clear and satisfactory, in order to acquit, as the proof of the crime ought to be to find a sane man guilty;" or to charge that if the jury have a reasonable doubt as to the insanity of defendant, they ought to convict, is error.

12. SAME. *Quantum of capacity.* No person can be guilty of murder who has not sufficient discernment to distinguish between good and evil, and who has no consciousness of doing wrong in the act he is committing.

Cases cited: *Gibson* v. *Gibson*, 9 Yer., 329; *Norton* v. *Moore*, 3 Head, 480; *Coffee* v. *The State*, 3 Yer., 283.

FROM MONTGOMERY.

Criminal Court, January Term, 1871, before JAMES E. RICE, J.

HORACE H. LURTON, for the prisoner, insisted: 1st, that the transcript of the record from the Circuit Court of Montgomery, to the Criminal Court of Montgomery, is not *properly certified.* The proceedings had in the Circuit Court in regard to the bill of indictment in this case, should have been certified to the Criminal Court, under the signature of the *Clerk*, who was the custodian of the record: Act of 1870, c. 115, s. 10, creating Criminal Court of Montgomery; Code, 3794. Definition of word "Court," used in Act of 1870: Bouvier's Law Dict., word Court.

2d. There is no prosecutor marked upon the indictment. The indictment was based upon the inquest, set out on page 47. This inquest is insufficient *in form and substance*, and is not an inquest for "willful homicide or murder," as required by the Code, 5097. As to what makes a valid inquest: Code, 5296 to 5309, inclusive. In this inquest, it does not appear that the jurors were *summoned*, or were *lawful men*, or *citizens* of the *county*. It does not show *when* Diggins came to his death, or *where*, or *how*, or whether *feloniously*. This is not a case of *omission*, to mark a prosecutor cured by section 5242 of Code. It is a question of the sufficiency of this inquest to render one unnecessary: Section 5242, strictly construed; 2 Cold., 184; 3 Cold., 118.

3d. The court erred in refusing to allow the medical experts to be present, and hear the testimony; 7 Met., 500; Bennett & Heard's Leading Crim. Cases, ——, and cases there cited: Ray on Insanity, § 638.

4th. The court erred in requiring the defendant to submit his hypothetical case to the opinion of medical experts, before the State's rebutting proof upon the sanity of defendant had been heard.

5th. The court erred in refusing to allow the defendant to show the incompetency of the witness, Virginia Holland, by showing that she was *his wife* by evidence of *reputation, cohabitation* and *acknowledgment* of the parties. Marriage may be so proven: 1 Tenn., 107, 396; 5 Cold., 539; *Ewell* v. *The State*, 6 Yer., 364.

6th. The court erred in refusing to allow witnesses to the question of sanity, to express an opinion as to sanity of defendant, after havsng stated facts upon which their

opinion was based: *Gibson* v. *Gibson*, 9 Yer., 329; 6 Cold., 22; 16 Ala., 776; 24 Ala., 241; 12 Miss., 223; 12 Ohio, 483; 19 Ohio, 303; 6 Geo., 324; 43 Mo., 133.

7th. The court erred in stating to the jury in his charge, "that the plea of insanity is put in. He *admits* that he killed *Diggins*, but says his mind was diseased at the time of the killing; that he was incapable of committing the crime. No plea of insanity was put in, and the defendant never admitted the killing of Diggins. By an examination of the record, the court will see that the proof wholly fails to prove that Diggins *died of the blows* inflicted upon him by Dove; nor is there any proof as to the character of the wounds. Yet the court charges the jury that the killing is admitted.

8th. The court erred in charging the jury that the proof of insanity must be as clear and satisfactory, in order to acquit on the ground of insanity, as the proof of the crime ought to be to find a sane man guilty: Code, 4597; 9 Hum., 670; 7 Met., 500; 3 Yer., 283; 1 Grey, 61; 7 Cold., 92; 29 Penn., 429; 31 Ill., 393; 39 Ill., 458; 2 Ala., 43; 16 N. Y., 58; 43 N. H., 224; 17 Mich., 9; 19 Ind., 170; 40 Ill., 352; 28 Ala., 692; 7 Grey, 583. And the attention of the court is particularly called to the copious notes and thorough discussion of this question, in 1st Bennett & Heard's Leading Crim. Cases, pp. 303 to 308, inclusive; and to the case of *The People* v. *Schryver*, 42 N. Y. Rep., to be found in 1 Am. Rep., 480; 2 Ala., 43; 10 Ohio State Rep., 598; 43 Mo., 133; 1 Bennett & Heard's Leading Crim. Cases, pp. 94 to 131, where will be found a review of the whole law of insanity, ancient and modern. Also, to January number,

1870, of Am. Law Rev., article on insanity; 4 Met., (Ky.) 227; 1 Duvall, (Ky.) 224; and authorities cited.

Attorney General HEISKELL, for the State.

The charge of the court, that, if there was a reasonable doubt as to insanity, the jury ought to convict, is right: *R.* v. *Stokes*, 3 Car. & Kir., 185, cited in Tay. Med. Jur., 681. The twelve Judges in McNaughton's case, say: "The july ought, in all cases to be told that every man should be considered of sane mind until the contrary was clearly proven in evidence; that before a plea of insanity should be allowed, undoubted evidence ought to be adduced that the accused was of diseased mind, &c.: Brit. & For. Med. Rev., July, 143, p. 273; Bucknill's Cr. Lunacy, 44; Tay. Med. Jur., 686. Mr. Erskine, in his defense of Hadfield, speaks of the rules of law as to insanity as being justified "from the extreme difficulty of tracing with precision the secret motives of a mind deprived by disease of its soundness and strength: Erskine's Speeches, vol. 4, p. 123; 1 Archb. Pl. and Ev., p. 37 to 42; 1 Whart. Am. Cr. L., §§ 55 and 711.

It was decided by fourteen of the fifteen English Judges, that there must be strong proofs of insanity before certain questions as to the opinions of medical experts, could be asked. Tay. Med. Jur., 695, citing Med. Gaz., vol. 46, p. 240.

In *Com'l* v. *Mohler*, 4 Barr., 266, Gibson, C. J., declares that, to establish homicidal insanity as a justification, it is necessary to show its existence by clear proofs: See Tay. Med. Jur., 688.

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In *Com'l* v. *Smith*, Allison, J., charged that the defense "requires to be examined with the greatest care, nor should it be relied on unless established by the clearest proof: Tay. Med. Jur., 689.

In *People* v. *Kleim*, cited in Law. Rev., vol. 4, 237, Edmonds, J., charged that insanity must be "clearly proved."

The English authorities establish the rule. Those before the Revolution are binding on the court. Those since, and the American authorities, are only persuasive: Heiskell's Dig. Tit., Authority.

That the experience of other States is not such as to encourage judicial legislation to pander to sentimental tenderness. English statistics show that out of 120 persons acquitted on the ground of insanity, 79 were not insane. Judicial legislation can not provide asylums, and as its powers are limited, ought to be sparingly used.

That doubt of insanity and doubt of guilt do not stand on the same footing. Rules of law are not matters of simple logical consistency. Policy influences them. Every man is presumed to know the law; to contemplate the consequences of his acts; malice is presumed from the use of a deadly weapon, or from the fact of killing; not because courts suppose these things are universally true in fact, but that policy demands their adoption. Policy, not logic, is the foundation of the rule as to drunkenness, that it shall not excuse crime. The legal reason for it is, logically, nonsense; practically, wise. The same policy demands that we shall adhere to the English rule as to proof

of insanity, not make a new one, as the courts of other States have done.

The defendant can not be sent to an Insane Asylum on a doubt as to his insanity. He must, therefore, in all doubtful cases, be turned loose upon the country.

In doubtful cases, the prisoner ought not to be punished capitally, but he is a fit subject for imprisonment on all the grounds for which punishment is applied. For restraint, for reformation, and for example. The necessity of restraint is of the highest. All admit the capacity of the insane, in many degrees and stages, to be influenced, and they are, capable of influence by example, while those who make pretense of insanity especially need the example.

On the admission of opinions, he insisted that the rules of evidence were more stringent in many cases in criminal than in civil cases. That the rule of responsibility was different, and that the State could also introduce opinions which might greatly prejudice the prisoner. The English case, cited from Taylor, 695, is conclusive on this question.

He argued the other questions orally.

NICHOLSON, C. J., delivered the opinion of the Court.

Richard Dove was tried and convicted of murder in the first degree, for killing William Diggins. The jury found that the murder was committed with mitigating circumstances, whereupon he was sentenced to the penitentiary for life. He has appealed to this court. The case was tried at the January Term, 1871, of the Crim-

inal Court of Montgomery county, where the following evidence was adduced:

The first witness introduced by the State was Virginia Holland. Defendant objected to her examination on the ground that she was his wife, but refused to examine her on *voir dire*, and objected to her examination by the State to prove her competency. Defendant offered to prove by evidence *aliunde*, that she was his wife. The court gave leave to prove that fact. Defendant then offered to prove the marriage of the witness with defendant, by reputation, cohabitation, conduct, and acknowledgment of the parties; and tendered proof of that character, but the court refused to hear such proof, and ruled that a marriage could only be shown by the certificate of marriage, the testimony of the officer who performed the ceremony, or the evidence of witnesses who witnessed the performance of the ceremony. Defendant excepted to the ruling. Witness then proved that she had been living with defendant three or four years. They were living in a house in the coaling ground of Poplar Springs Furnace, in Montgomery, at the time of Wm. Diggins' death, which took place in 1869. Dove was working for Diggins in the coaling grounds. Dove, witness, her two children, her mother, her sister, and Diggins, all lived in the same house, it having but one room. There were three beds in the room; witness and Dove occupied one, her mother and sister another, and Diggins and her oldest child, seven years old, the third. Dove and Diggins ate supper together; they were very friendly; there was no bad feeling between them; they laughed and talked together,

and then went to bed, and were so laughing and talking when witness went to sleep. About 2 o'clock at night, witness was awakened by the blows being struck by Dove with an axe, and by the cries of Diggins, who said: "Oh! Dick; oh! Dick." Witness saw and heard Dove strike Diggins two or three blows with the axe. She jumped up and went to Diggins' bed, saying, "Dick, you have killed my child!" She pulled the child from under Diggins. Dove said: "You see what I have done, and it is not the first I have done that way. I have done many a one that way." He walked across the floor, and then said: "Now if the old son-of-a-bitch has any money, I intend to take it to travel on;" and took up Diggins' pants, and took out his pocket-book and examined it, and said: "He's got no money; here's some scrip; I won't have that; but I'll take his knife;" and did put it in his pocket. He then threw a blanket over Diggins. Dove then asked witness what she was going to do; whether she was going with him. She replied she did not know; that she didn't want to go with him. He then went out, and came in again with the axe in his hand and said: "Now say what you are going to do, and say it quick. I can't leave you to witness against me. If you don't go with me, I shall see the last of all of you. You sha'n't be left for witnesses against me." He then told witness' mother to take Diggins' chickens to the Furnace, about a mile and a half or two miles, and sell them, and collect a half dollar a negro owed him, and meet him at the Furnace that night at 12 o'clock. Witness, Dove, and her two children, then went off into

the woods; but before leaving, Dove hid the axe under the sill of the house, where he said it could not be found. They stayed in the woods all day. Dove kept the knife in his hand, and said he would kill witness if she tried to leave him. Late in the evening they went towards the Furnace, and upon getting near the road, she saw Mr. Mathis and Mr. Brown, and she ran to them with her children, and asked for protection. She went on with them to the Furnace. Dove had lived with Diggins five or six months. She said Dove was once jealous of Diggins, but he had been satisfied about that. Diggins was an old gray headed man, about sixty years old. He was a quiet, good old man. She said Dove was a very passionate man; often got very mad without any cause; would be violent and irritable when no one had troubled him. Sometimes threatened witness and her mother, and had struck her without provocation. He frequently threatened to kill somebody; frequently said he would have the heart's blood of somebody, walking the floor, in a great fury, throwing his arms wildly about, though nobody had done anything to him. His threats were not at anybody in particular. During one evening, while they were all sitting around the fire, he jumped up, gathered a chair, and tried to strike Diggins; but was prevented by a young man present. There was no cause for this, no quarrel, nor was any warning given of his attack. He was not drunk, but had taken two or three drinks. He often complained of head-ache; he so complained during the day before Diggins' death. To the question by the Attorney General, whether Dove,

from all she knew of him, was a man of sane or insane mind, answered: She never saw anything wrong about him; he was a very quiet man; a sullen and irritable man often, but talked like a man of sense.

Sarah Holland, the mother of the last witness, gave the same account of the transaction, and stated the character and peculiarities of Dove about as the last witness.

John W. Mathis proved that Dove was a lazy, trifling, indolent man; he was a strange man; nobody knew him; witness never knew him, though he had lived with him.

Sam. Tally, worked with Dove; he talked like any other man; he never had much to say; was very quiet. One day, when they were working, he suddenly stopped, and said, with an oath, "he would kill any man who would not work for himself, but made other people work for him." He said Diggins did not work for himself, but made him work for him; that he would kill him before he would stand it any longer. This was some time before Diggins was killed. Diggins was not present, and they had no quarrel. He talked and acted like any other man.

The State introduced and read a paper purporting to be the return of a jury of inquest over Diggins' body, over the objections of defendant.

Jefferson Sly, for defendant, had employed Dove to work. He quit without cause; witness went to see him; complained of his head; acted strangely; walked the floor, and acted like a drunken man, but he had no whisky. While Dove worked for witness, he was very taciturn and gloomy; would sit by himself for

hours at a time; indulged in talking to himself a great deal; would mumble and sing to himself; complained often of pains in his head; wouldn't work as long as he had anything in his house to eat. He was asked by defendant's counsel what, from all he had stated, was the condition of his mind: was he of sound or unsound mind? The Attorney General objected to the question, and the objection was sustained by the Court.

James Andrews, T. J. Sly and Jeff. Wooten, testified to similar characteristics of Dove as the last witness.

Patsey Cozzart, a sister of Dove, testified that he was 47 or 48 years of age; was born in Alabama; went to East Tennessee, and lived there until he was 13 or 14 years of age, when he came to Nashville. He was a clerk for Mr. Norman, in the grocery business, one or two years. While engaged with Mr. Norman, he received a bad wound on one side of his head; he was not expected to live. He was deranged from the wound. He talked silly and incoherently. He stayed with witness, while he was laboring under the wound, about four months. He then left, and returned to Mr. Norman's. He was not then well; he was not much better. He complained of pains in the head all the time. He received the injury about fourteen or fifteen years ago. Before receiving the injury he was as smart, active and energetic as any man. She never saw him but once after he left, and that was twelve or fifteen years ago. She saw him but a few minutes; he said his head was not well.

The counsel for the defendant announced to the Court, that he expected to examine several physicians,

as experts, on the subject of defendant's sanity, but desired, before doing so, that the State might examine any further witnesses she might have on that subject. The Court ruled that the defendant must complete his testimony before the rebutting evidence of the State should be introduced. Defendant excepted to the ruling.

Dr. D. F. Wright testified, that he had been practicing as a physician and surgeon for twenty-seven years. He had examined the head of defendant, and found that he had received an injury to his head, apparently from a blow. It appears that there are two injuries to his head—one on the right side, just below the crown; the skull has been fractured, and a portion of the bone is depressed upon the brain. The depressed portion is fractured about the centre, and a piece of the skull bone is broken off, which protrudes through the fracture, and is now sticking down upon the brain. One of the injuries may have been the result of concussion, resulting from the blow which caused the depression. Without knowing anything of the previous history of the defendant, witness said such an injury was bound, more or less, to produce a diseased mind. Such an injury might produce disease of the mind that might lay dormant an indefinite length of time, or it might indicate its presence only in paroxysmal insanity. Its presence might only be detected by some startling crime, that would, for the first time, call attention to symptoms that only an experienced person could have noticed. Paroxysmal insanity would be the character of insanity most likely to result from such an injury. During the intervals between the paroxysms of one afflicted with that form of

insanity, the patient might appear reasonably rational, and might converse with intelligence. The symptoms of paroxysmal insanity are, moodiness, gloominess, melancholy, love of solitude, a feverish restlessness, irritability, passion without apparent cause. The persons afflicted often commit the most horrible crimes without any known cause, murders without motives discernible, and often upon those persons to whom they are most dearly attached, or those to whom they are indifferent. The patient is often overpowered by an impulse to commit murder, and yet is conscious of the crime he commits, and of the penalty incurred. He may converse rationally about his crime, confess, or seek to conceal it. An effort to conceal the crime, or to escape, would not be evidence of sanity.

The counsel for defendant then submitted to the witness a written synopsis of the facts, as proven in the case, relative to the condition of defendant's mind, and asked his medical opinion on the hypothetical case stated. He said the symptoms there stated were the precise symptoms of one laboring under paroxysmal insanity, and that he should say the strong probability was, that he was insane at the time of the commission of the crime; that, without personally knowing the facts and the defendant, he could not put it in stronger language.

Drs. T. D. Johnson and J. M. Larkins were asked their opinions on the same hypothetical state of facts, and they fully concurred in the opinion given by Dr. Wright.

After charging the law correctly as to the several grades of homicide, the Circuit Judge proceeded to instruct the jury on the defense of insanity, as follows:

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"The law presumes a man to be sane, until the contrary is proven. The evidence of the insanity of defendant must be as clear and satisfactory to overturn the presumption of the law in favor of sanity, as it is required to be, to overturn the presumption in favor of innocence. If the testimony leaves only a doubtful question, whether he was insane at the time of the killing, the presumption of the law turns the scale in favor of the sanity of defendant. In such case the law holds the defendant responsible for his acts. If the evidence leaves it doubtful in your minds, whether the defendant killed the deceased, then you should acquit; for there you find a reasonable ground for doubt, whether the defendant committed the homicide; and in such case, the testimony is not sufficient to overturn the presumption of innocence. But where it is admitted, or clearly proven, that the defendant committed the homicide, but it is insisted he was insane at the time he did it, and the evidence leaves the question of sanity in doubt, then you should find him guilty; for the other presumption arises, namely: that every man is presumed to be sane until the contrary is proven; or, in other words, where evidence of sanity on one side, and of insanity on the other, leaves the question in an even balance, or so nearly poised that you have reasonable doubt of the insanity of the defendant, he is in that case to be considered sane, and therefore responsible for his acts. The proof of insanity at the time of committing the homicide, ought to be as clear and satisfactory in order to acquit on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty."

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Several errors have been assigned on the record in this case, which we will now proceed to examine:

1st. This cause was transferred from the Circuit Court of Montgomery county, to the Criminal Court of that county, under the provisions of the Act of 1870, c. 95, establishing a Criminal Court for Montgomery county. It is insisted that the transcript of the record from the Circuit to the Criminal Court, is not properly authenticated. It is certified by the Circuit Judge, and not the clerk of the Circuit Court. The tenth section of the act requires the Circuit Court to certify to the Criminal Court, transcripts of the entry and finding of all indictments and presentments now pending in the Circuit Court, which shall be transcribed upon the records and minutes of said Criminal Court, and said entry of record shall give to said Criminal Court full and complete jurisdiction of said criminal matters. The third section requires the Circuit Court to transfer all bills of indictment and presentment to the Criminal Court, for trial and proceeding therein; and section four makes the clerk of the Circuit Court the clerk of the Criminal Court. After the transcript from the Circuit Court was entered upon the record and minutes of the Criminal Court, and after the bill of indictment was transferred to the Criminal Court, the defendant was arraigned upon the indictment, and put in his plea of not guilty. We do not doubt that a transcript, certified by the clerk of the court, or by the judge thereof, after its entry on the records of the Criminal Court, gave that court full jurisdiction of the case; and if any doubt had existed as to this, the objection ought to have been taken before pleading. But we think the Criminal Court

had full jurisdiction of the case, and overrule this objection.

2d. It is insisted that, as there was a prosecutor marked on the indictment, it was error not to arrest the judgment. The indictment is marked, "no prosecutor necessary," evidently because there was the return of the jury of inquest. But it is immaterial whether the return of the jury inquest was a valid or an invalid return. If the former, no prosecutor was necessary; if the latter, the omission to mark a prosecutor was cured by section 5242 of the Code.

3d. It is said the court erred in requiring the defendant to submit his hypothetical case to the medical experts, before the State's rebutting evidence on this question of insanity was given to the jury. The court followed the usual practice of requiring the defendant to adduce all his evidence before the State should be called on to bring its rebutting evidence. If the defendant had applied to the court, after the State had finished its rebutting proof, to examine the medical experts, with the additional evidence of the State before the jury, and the application had been refused, it would have been error. But no such application was made, nor was the defendant in any way damaged, as the State introduced no rebutting evidence which made it necessary to re-examine the medical experts.

4th. It is assigned in error, that the court refused to allow the defendant to show the incompetency of the witness, Virginia Holland, by proving her marriage with the defendant by reputation, conduct and acknowledgment of the parties. The refusal of the judge to hear the evi-

dence tendered, must be understood as having special reference to the state of the question then before him. It was a question for the court, and not for the jury. The State had introduced a witness not bearing the name of the defendant. The defendant objected to her competency, alleging she was his wife. But he refused to examine her on her *voir dire*, and objected to her examination, as to her competency, by the State. The court allowed defendant to introduce proof of the marriage *aliunde*. He was bound then to produce the best evidence. This he did not do, or show any excuse for not doing. The court thereupon properly rejected the secondary evidence. It was manifest that the witness was not, in fact, the wife of the defendant. There was no error in this action of the court.

5th. It is insisted that it was error in the court to refuse to allow witnesses, to the question of sanity, to express an opinion as to sanity of defendant, after having stated facts upon which their opinion was based. This question arose in the case of *Gibson* v. *Gibson*, 9 Yer., 329. Upon examination of the authorities, which were not found very satisfactory, the court laid down the following propositions: "First—Attesting witnesses, and they only, are trusted to give their opinion merely, and without cause or reason assigned, of testator's sanity. Second—Physicians may state their opinion of the soundness of a testator's mind, but they must state the circumstances or symptoms from which they draw their conclusions. As to all others, their opinions, considered merely as opinions, are not evidence. But having stated the appearance, conduct or conversation of testator or other particular

fact from which his state of mind may be inferred, they are at liberty to state their inference, conclusion or opinion, as the result of those facts." The court adds: "After all, it is the facts which a witness details, the conduct which he describes, which chiefly and principally constitute the testimony to be relied on." This question was again fully examined in the case of *Norton* v. *Moore*, 3 Head, 480, where the same rule was adopted. The rejection of the opinions of the witnesses, based upon the facts and circumstances stated by them, was erroneous.

6th. It is insisted that the judge trenched upon the province of the jury in charging them as follows: "But the plea of insanity is put in for the defendant. He admits that he killed the deceased, but says that his mind was so much diseased at the time of the killing that he was incapable of committing the crime of murder, he being insane." The obvious meaning of the judge was, that the plea or defense of insanity was put in for the defendant, and not that the defendant had put in a formal plea of insanity to the indictment. The residue of the statement was evidently intended to instruct the jury, that, in relying upon the defense of insanity the killing was necessarily admitted. We can not well see how the jury could have been mislead, or how they could have misunderstood the true meaning and purport of this language. We, therefore, think, this assignment of error, is not well taken.

7th. The last and most important error assigned is, as to that portion of the charge already quoted, in which the judge, among other things, said: "The proof of insanity must be as clear and satisfactory, in order to acquit

on the ground of insanity, as the proof of the crime ought to be to find a sane man guilty." The plain and unambiguous meaning of this language is, that the defense of insanity can not be available, unless it is proved beyond a reasonable doubt. In another portion of the charge, the judge says: "That, if the evidence of sanity and of insanity be on an even balance, or so nearly an equipoise that you have a reasonable doubt of the insanity of the defendant, he is in that case to be considered sane, and therefore, responsible for his acts." It is conceded that this cause is sustained by English cases, and by cases in a few of the States, but it is certain that it is in contravention of a large number of decisions in other States of the Union.

We have had no case in our own State where the exact question involved in the present one has arisen; but we consider the principle which must govern the decision as having been laid down in the case of *Coffee, Ridley & Short* v. *The State,* 3 Yer., 283, and followed ever since in subsequent cases. These cases were determined in 1832, and separate opinions were given by Judges Catron, Green and Peck. The cases had been tried before Judges Stuart and Kennedy, of whom Judge Catron said: "They are gentlemen of decided talents, accurate and extensive information on the criminal law, and great experience." They had charged the juries, "that the law presumed the defendant innocent, and that presumption stood until the fact of killing was clearly made out by proof; and if they entertained a reasonable doubt as to the fact of killing by the defendant, they should acquit him; but if the fact of killing by the defendant be proved, the law presumed

him guilty of murder, unless the proof showed clearly and satisfactorily the offense was one of less magnitude; and therefore, if they entertained doubts under the testimony, whether the act amounted to murder or manslaughter, they were bound to find defendant guilty of murder, as it lay upon the defendant to show clearly and beyond a reasonable doubt, that the offense was not murder, but manslaughter, unless it appeared otherwise in the testimony of the State." Judge Catron said: "The defendant is charged with the fact of killing and the intent with which it was done, and the fact and the intent, must concur to constitute the crime. The fact and intent are charged by the State, and must be proved to the conviction of the jury. But suppose they are not convinced that it is their duty to find the defendant not guilty; that is what is meant by a reasonable doubt."

In such case, he says: "If, from this whole body of evidence, they are convinced of the killing, but are not convinced that it was done with malice, they ought not to find the defendant guilty of murder." Judge Green said: "There is no reason in saying that a jury must acquit upon a doubt as to the fact of killing, and yet upon a stronger doubt as to the equally important fact of malice, they must convict. It is admitted that if this state of the mind (doubt) exist as to the fact of killing, an acquittal must follow. But not so as it relates to the malice. And why? Because we are told there is a legal presumption to afford the mind a resting place. In answer to that proposition, it has already been shown that this legal presumption, which was *prima facie* evidence of the fact, has been opposed by

evidence so weakening its force as no longer to be satisfactory, and consequently a doubt as to the fact thus presumed, must now exist. I hold, therefore, that to warrant a verdict of guilty of murder—the whole evidence taken together—must generate full belief of the guilt of the party as consisting in the killing with malice. Whether, therefore, the doubt exists as to the killing, or as to the evidence of malice in the perpetrator, it results in the same thing—that is, a doubt whether the accused be guilty of the crime of murder." Judge Peck concurred in the reasoning, and conclusions of Judges Catron and Green. The charges of the Circuit Judges were overruled, and from that time to the present, the law has been settled in our State, that, if the proof fails to generate full conviction of every material ingredient constituting the crime of murder, the defendant must be acquitted. But the question is now raised, whether this principle of law is applicable to a case where there is reasonable doubt of the sanity of the defendant? The Criminal Judge, it has been seen, adopts the same doctrine as to reasonable doubt in the matter of sanity that Judges Stewart and Kennedy did as to the presumption of malice from killing.

Is there any sound reason upon which it can be held that a doubt as to the malice in the killing shall operate as an acquittal, but that a doubt as to the sanity of the defendant at the time of the killing shall not so operate?

"If any person of sound memory and discretion, unlawfully kill any reasonable creature, in being, and

under the peace of the State, with malice aforethought, either express or implied, such person shall be guilty of murder": Code 4597. We have adopted the definition of murder given by Sir Edward Coke. The person to be guilty of murder must be of sound memory and discretion; "for," as Blackstone says, "lunatics or infants are incapable of committing any crime, unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil."

Assuming that this interpretation of the words "sound memory and discretion" is sufficiently accurate, it may be safely stated that no person can be guilty of murder who has not sufficient discretion or discernment to distinguish between good and evil, and who has no consciousness of doing wrong. The law presumes every person to have this sound memory and discretion. Therefore, when the defendant was put upon his trial for murder, it was not necessary for the State to adduce proof of his sanity. The presumption of law stood for and supplied the proof.

If he relied on the defense of insanity, the burden of proof was upon him to show that he was not of sound memory and discretion, unless the proof of the State showed that he was not of sound memory and discretion. To warrant a conviction, it must appear that the accused was capable, at the time of the killing, of distinguishing between good and evil, and had a consciousness of doing wrong. If he was thus sane, he could act willfully, deliberately, maliciously and premeditatedly. We have seen, that, to justify a conviction for murder in

the first degree, the State must show beyond a reasonable doubt that the killing was done willfully, deliberately, maliciously and premeditatedly. All these are essential ingredients in the offense, and all must be proved beyond reasonable doubt. But, suppose the proof in the cause makes it an even balance in the minds of the jury, whether the defendant was sane or insane. How, in that state of doubt, could the jury find that the defendant did the killing willfully, deliberately, maliciously and premeditatedly? They are in doubt about his being of sound memory and discretion. Of course they must doubt whether he could have done the killing willfully, deliberately, maliciously and premeditatedly. Yet, in the case before us, the judge instructed them that if the proof left their minds in *equipoise* as to the sanity or insanity of the defendant, the presumption of law turned the scale, and the defendant must be regarded as sane. The presumption of sanity stands for sufficient proof of sanity until the presumption is overturned. When the proof of insanity makes an *equipoise* the presumption of sanity is neutralized—it is overturned, it ceases to weigh, and the jury are in reasonable doubt. How, then, can a presumption, which has been neutralized by countervailing proof, be resorted to to turn the scale? The absurdity to which this doctrine leads will be more obvious by supposing that the jury should return a special verdict. It would be as follows: "We find the defendant guilty of the killing charged, but the proof leaves our minds in doubt whether he was of such soundness of memory and discretion to have done the killing willfully, deliberately, maliciously and

premeditatedly." Upon such a verdict no judge could pronounce the judgment of death upon the defendant.

It is impossible to read the evidence in this case and not feel shocked by the enormity and atrocity of the crime, if we assume that the defendant was of sound memory and discretion. An old, quiet, inoffensive man is brutally cut to pieces with an axe while he is sleeping peacefully in the room with the defendant and his family. No provocation had been given, there was entire friendship and cordiality between them when they retired to bed. Yet the jury found that the murder was attended with mitigating circumstances, and the defendant was sentenced to hard labor for life in the penitentiary.

We have searched the record in vain for any semblance of a single mitigating circumstance. We are forced to the conclusion that the jury doubted whether the defendant was sane, and being instructed by the court that such doubt would not justify an acquittal, they gave the defendant the benefit of this doubt as a mitigating circumstance by way of saving him from the gallows. It has been earnestly and ably pressed upon us in argument, that the doctrine charged by the Criminal Judge ought to be adopted from considerations of public policy. It is conceded that the doctrine ought not to be carried to the extent of subjecting defendant to capital punishment, about the soundness of whose memory and discretion the juries may have doubts. This, it is admitted, would be too shocking to humanity to be tolerated. But t is insisted that the peace of society, and the prevention of the repetition of such horrible tragedies by defendants

whose sanity is doubtful, would justify the courts in holding that defendants who rely upon the defense of insanity should be required to establish their defense beyond reasonable doubt, otherwise that they should be held responsible as criminal, and subjected to imprisonment for life.

The force of this argument is much strengthened by the facts proven as to the violent character of this defendant. To turn him loose might be to subject some other innocent victim to the same fate with Diggins. But this is not the tribunal to which the consideration of public policy can be appropriately addressed.[1] Our business is to administer and not to make the law. We find the law well settled, that when the State charges a citizen with crime, his guilt must be established beyond reasonable doubt. We apply this rule to the worst men about whose sanity no doubt is raised, and turn them loose to repeat their crimes, because they are entitled to the benefit of the humane doctrine of doubts. With what show of reason or humanity could we reverse the rule as to that unfortunate class of citizens whose memory and discretion is found to be of doubtful soundness, and subject them to imprisonment for life. If the law, as it now stands, furnishes no remedy for the protection of society against the danger of turning loose homicidal maniacs, it is time that the Legislature had provided a remedy. But it seems to

[1]The argument that it was intended to urge, was, that the established law of England recognized this rule, and that policy forbade a departure from it—not that a new rule should be adopted upon such considerations now.

us that every society has the remedy within its reach. We do not see what obstacle is in the way of having all such cases tried by regular proceeding to ascertain the fact of insanity, and for the proper disposal of its unfortunate victims: Code 1553.[1] But Section 1554 of the Code provides specially that when the defense of present insanity is urged on the trial of a person charged with a crime which subjects him to imprisonment or death, it is the duty of the judge to submit the question of sanity to the jury as a preliminary question, and if the defendant is found to be insane, the judge orders him to the Lunatic Asylum. The facts of this case might well have induced the judge to follow the directions of this section of the Code.

Our duty is discharged in declaring that the defendant has been convicted and sentenced to imprisonment for life contrary to law.

We reverse the judgment, and remand the case for a new trial.

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[1]The obstacle lies in the fact that the defense of present insanity is never put in when the fact of insanity at the time of the offense will answer the purpose.

The State *v.* Chris Hickerson.

THE STATE *v.* CHRIS HICKERSON.

An indictment for selling spirituous liquors on Sunday, is good without showing to whom the sale is made.

FROM MONTGOMERY.

Criminal Court, August Term, 1871. T. W. KING, J.

Attorney General for the State, cited: Code 4680; *State* v. *Sharrer*, 2 Cold., 324; *State* v. *Barker*, 4 Sneed, 555; *Eskridge* v. *State*, 1 Swan, 414; *Sword* v. *State*, 5 Hum., 102, 103; *Dean* v. *State*, 5 Yer., 367; *Brown* v. *State*, 5 Yer., 367; Caldecott, K. B., 432; *Com'l* v. *Maxwell*, 3 Pick, 139. Insisted that there was a distinction in pleading, between offenses affecting the public, as disturbing public worship, affray, nuisance, gaming and selling liquor to slaves, where the party injured need not be named, and offenses injurious to the person.

NICHOLSON, C. J., delivered the opinion of the Court.

Chris Hickerson was indicted in the Criminal Court at Clarksville, for selling spirituous liquors on Sunday.

The indictment does not designate any particular person to whom liquor was sold; but charges defendant generally with selling liquor on a specified Sunday. The indictment was quashed, as we suppose, because the person or persons to whom the liquor was sold, was not

specified. The statute, under which the indictment was framed, was intended to prevent the desecration of the Sabbath, and to prevent disturbances of good order on that day. To prevent evasions of this statute, and to effectuate the object had in view, it is provided by sec. 4840, of the Code, that the statute shall be liberally construed. It is intended to punish those who sell, and not those who buy the liquor; those who desecrate the Sabbath by selling liquor. Giving to the statute, therefore, a liberal construction, we think it was not necessary to name the persons to whom the liquor was sold.

The judgment is reversed, and the case remanded.

JOHN C. WILLIAMS *v.* THE STATE.

1. INDICTMENT. *Illegible or doubtful writing.* The Court, when a word in an indictment is equivocal, as if it be doubtful whether it be impanelled or impounded, will read it to make sense rather than nonsense.
2. SAME. *Impounded for impanelled.* The substitution of the word impounded for impanelled, in the caption of an indictment, would not be error for which a Court would reverse.
3. SAME. *Unlawfully, not necessary in murder.* The word "unlawfully" is not necessary to describe the offense of murder in the first degree.[1]
4. EVIDENCE. *Conversation. Introduction of part entitles adverse party to the whole.* Where the defendant examines a witness to prove a conversation with the prosecutor, the State may bring out the whole of the conversation so introduced, though it may involve statements concerning independent offenses.
5. SAME. *Error. Exception must be taken below.* The action of the Court in the admission or rejection of evidence, not excepted to, can not be

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[1] See *Riddle* v. *State*, *post*, 401.

made a ground of reversal. Where the record shows that the Court, among other things not excepted to, charged, &c., it will be presumed that any material point not shown in the charge was given among the matters not excepted to.

6. ERROR. *Charge not required on matters not involved.* On an indictment for murder in the second degree, and a conviction for murder in the second degree, a failure to charge upon the law of involuntary manslaughter will not be considered error, unless the facts show that such a charge would have been pertinent to the case.

7. SAME. *Failure to charge. Request.* A charge not asked for in a capital case, need not be given.

8. MURDER. *Provocation.* Words or conduct calculated to induce the belief that the deceased intended to provoke a difficulty, are not such provocations as will reduce a killing from murder in the second degree to manslaughter.

9. SAME. *Self-defense.* To excuse a killing on the ground of self-defense, the danger to the defendant must be real, or honestly believed to be so, on sufficient grounds.

10. SAME. *Same.* Past threats or conduct of the deceased, how violent soever, will not excuse a homicide without sufficient present demonstration to authorize the belief that the deadly purpose then exists, and the fear that it will be then executed. The danger must be present, apparent and imminent, and the killing must be done under a well-founded belief that it was absolutely necessary for the defendant to kill at that moment, to save himself from a great or like injury.

Cases cited: *Rippy* v. *State*, 2 Head, 218; *Copeland* v. *State*, 7 Hum., 479; *Grainger* v. *State*, 5 Yer., 459; *Williams* v. *State*, *ante*, 37.

FROM LINCOLN.

Circuit Court, November Term, 1871, before W. P. HICKERSON, J.

W. H. KERCHEVAL & J. H. BURNAM, for the prisoner.

Attorney General HEISKELL, for the State.

NICHOLSON, C. J., delivered the opinion of the Court.

At the November Term, 1871, of the Lincoln County

John C. Williams *v.* The State.

Circuit Court, John C. Williams was tried for the murder of Toliver R. Garret, and convicted of murder in the second degree, and sentenced to the Penitentiary for twenty years. His motions for a new trial and in arrest of judgment having been overruled: he has appealed to this Court.

The first error assigned is, that the judgment ought to have been arrested, because it appears upon the face of the indictment that the grand jurors were duly elected, "*impounded,*" sworn, &c., instead of being elected, "impanelled, sworn, &c. In the indictment, as copied in the transcript, the word is "impanelled. It is said that the word in the original indictment may be read either "impanelled" or "impounded." The presumption is, that the real word intended to be used was "impanelled," instead of "impounded," as this would make sense, while the word "impounded" would mean nothing. There is no substance in the objection, even if the nonsensical word "impounded," had been plainly written.

The next objection is, that in describing the offense of murder in the first degree, the word "unlawfully" is omitted in the indictment.

This question was settled in the case of *Williams* v. *The State*, 3 Heis., 37. This objection, therefore, is not well taken.

It is next objected that incompetent testimony was given by the witnesses, Burnett, Baker and Riley. These were defendant's witnesses, introduced by him to show that Garret had an old grudge at defendant, and that the fact of his having this old grudge was communicated to defendant before the killing. In detail-

ing the entire conversation between the witnesses and Garret, independent transactions were alluded to by him, which the State would not have had the right to prove. But when the witnesses detailed parts of the conversations, the State had a right to have them all detailed. For this reason, and because no objection was made by the defendant to the evidence when given, he can not now object to it.

The next objection is taken to the charge of the Court. The charge is full, and in detail as to the several grades of homicide embraced in an indictment for murder in the first degreee. The several offenses are correctly defined; the proof to sustain each stated; the distinguishing characteristics of each offense fully laid down, the necessity of the ingredients being proven beyond a reasonable doubt, and the circumstances under which the homicide would be justifiable: all these matters are fully explained to the jury; but the Judge, so far as appears in the charge, said nothing on the subject of involuntary manslaughter.

This is urged as a fatal error. There are several answers to this objection. First, the record shows that "among other things not objected to, the Court charged as follows," &c. The presumption is, that the judge charged satisfactorily to defendant as to involuntary manslaughter, and for that reason, that portion of his charge was omitted. Second, the facts, as they appear in the bill of exceptions, do not show that a charge as to involuntary manslaughter would have been pertinent.[1] And third,

[1]In the case of *Woodford Ray* v. *The State*, decided Dec. 9, 1871, the defendant was indicted in two counts for rape, and assault to commit rape. It

the judge was not requested to charge the jury on this branch of the law of homicide, though he was requested to charge on a hypothetical state of facts, that defendant would not be guilty of either "murder or involuntary manslaughter." It is clear, therefore, that the objection to the charge is not well taken.

The last, and most important question raised, is, as to the sufficiency of the evidence to support the verdict. The settlement of this question makes it necessary to examine with care the evidence in the case.

The first witness for the State was William Edwards. He proves that Garret was killed about the 1st of September, 1870, at witness' house. He was shot by defendant with a shot gun, and did not live a minute. Garret was employed by witness to build a stable, but he was not at work that day. He was at witness' house early in the morning, and afterwards was at witness', and defendant's still-house, and was drinking, but remained but a short time, and made no inquiries for, or said anything about defendant. Garret returned again to the still-house in the evening. Witness and defendant were gearing up the team to haul some brandy to witness' house, which was about a quarter of a mile distant. Defendant's house was about a mile distant. When Garret re-

was held, Sneed, J., delivering the opinion, that "The omission of the Circuit Judge to charge the law as applicable to the second count, was no error in this case. The second count charged an assault and battery, with intent to commit a rape. There is no proof in the cause to which such a charge would have been applicable, except so far as the battery is part of the accomplished fact of rape. According to the proof, the crime of rape was consummate, and the offense under the proof could have been nothing less. The charge upon the second count would, therefore, have been but an abstraction, which the Circuit Judge did very well to withhold."

turned to the still-house in the evening, he "came cursing, ripping and swearing." He got off his horse, took the proof vial, sunk it into a barrel of brandy, came to where defendant and witness were, put his thumb on the mouth of the vial, as if he was going to try the bead, struck the vial in his hand, and looking at defendant, drank a toast, which was a vulgar toast. It was not a toast of friendship or health, but was a vulgar toast. Defendant said to witness: "I must leave here, or I will have a difficulty with Garret." Witness advised him to go, to avoid a difficulty with Garret. Defendant then left, and went to witness' house. Garret was at the still-house about half an hour. Witness left the still-house a short time before Garret, leaving at the still-house, Garret, McIntosh and Stroud. Defendant had left the still-house some time before witness did. Garret overtook witness and Tillery, and the three went together to witness' house; witness walking, Tillery driving the wagon, and Garret riding horseback. On the way, Garret pulled out his pistol and waived it. This was about three hundred yards from witness' house. The pistol was then put up. They approached the house on the east side. Witness pulled down the fence to let in the wagon, but Garret leaped the fence with his horse before it was pulled down. When the three got in sight of witness' house, they came to the road leading to Garret's house, which passed about forty yards from witness' house. Witness tried to get Garret to go on his road home, saying to him, "yonder is Williams' horse." Garret said, "I have got to have another dram." After they got into the house, witness said to Garret, "if I give you another

dram, will you go off," and he said he would. But before this, Garret had helped witness, defendant and Tillery, unload the wagon. After witness gave Garret the dram, he got on his horse and started off. He afterwards came back, and called witness out, and the two were talking about exchanging some brandy for bacon. Garret said, "there is one fellow in the house that he would go that far in hell for," (measuring about twelve inches on his arm.) Tillery and defendant were in the house at the time. Garret and Tillery were unfriendly at the time, but they spoke to each other. Witness says that when Garret went into the house when they arrived with the brandy, there were only two or three words passed between him and defendant. While witness and Garret were talking about the exchange of brandy for bacon, defendant stepped to the door and said, "Garret, you have come for a fuss, and by G—d, if you don't mind you will get it." Garret replied, "just walk out, and you can have it. I will give more than you can take, or can carry off from here." When Garret said that, defendant stepped back and got his gun, and then stepped out on the puncheon between the houses, and said, "are you in the same notion still," and defendant shot him. When Garret saw defendant with the gun, he said, "by G—d, let it come." He was at the time sitting on his horse, about eight steps from the house. His pistol, a five or six shooter, was in his left pants pocket. He was a left-handed man. Garret had been living in the neighborhood about two years. When sober he was a peaceable man, but when drunk he was a dangerous one. He was drunk that day. He was a small man, tolerably stout, and a little larger than

defendant. While unloading the brandy, Garret and defendant did not speak. One had one end of the barrel, and the other the other end. Garret did not draw, or attempt to draw, any weapons, after he came to the house. At the time defendant said to Garret, "you have come for a fuss, and by G—d if you don't mind you can get it," Garret had not said anything to defendant, or about defendant; that is, did not mention defendant's name. It was about eight steps from the house when Garrett said, "He would go twelve inches in hell for a fellow in the house."

Milly Edwards, for the State, proved that defendant was at her house the day Garret was killed. Defendant came first. After he got there, he said, "he had seen Garret at the still-house, and Garret was cutting up down there; that Garret had said nothing to him, but he knew Garret was pitching it all at him." Defendant got his gun and called for powder. He sat down and laid the gun across his lap. This was before Garret got in sight. Witness saw Garret coming, and told defendant to go and hide from him. He said, "he had been running long enough, and he did not intend to run any further." He then told me and Mrs. Fowler to go into the other room. He then saw Garret coming, and got up and set the gun behind the door. Witness told defendant to run. He said, "he had given up his house once to Garret, at the Plains, and he was not going to run any more." Witness saw Garret when he came up. He was not doing anything. He came up behind the house, after he started off, and talked with Edwards. The gun belonged to

Williams; he left it at Edwards' some time in passing, two or three weeks before. He took the gun off with him. She did not see the shooting. Garret rode close up to the house, when he came back. Defendant was sitting down. Witness was standing up.

Mrs. Fowler, for the State, proved that she was at Edwards' the day Garret was killed. Defendant said: "If Garret comes up, he intended to kill him; he had run long enough." He had the gun across his lap, scraping it; said to me to go into the other house. Garret came up and said "howd'y" to me, and nodded his head to defendant; but defendant did not speak. Garret came up horseback; was off of his horse when he spoke. Before Garret came, defendant said he had run his last time. Witness left before the killing.

On cross-examination, witness said, the first she saw of defendant, he was sitting in the door, with the gun in his hand. Garret walked up to the house and nodded. She don't know whether he spoke to witness or defendant.

This was all the testimony of the State, as to what occurred at the house at the time of the killing.

Byers, for the State, proved that, on the day of the difficulty at Pleasant Plains, about six months before the killing, defendant came to him for a gun. He did not get it. Defendant made no threat against Garret. Garret wanted witness to get half a pint of whisky from defendant's grocery, saying that he did not want to go there; that he did not want to meet defendant. Garret had a shot gun and pistol. He was

very drunk that day; heard him make no threats against defendant; he was inclined to be boisterous when drunk.

John J. Rauls, for the State, proved that he was at the Plains the day of the difficulty; saw some demonstrations between defendant and Garret that day; heard no threats by defendant; saw Garret knocking around on the streets with a gun; at the same time defendant came into witness' store and got a shot-gun, and loaded it. He next saw defendant when Garret was down on the ground or platform; defendant had a gun, and said: "Shoot him," or, "kill him;" this was soon after defendant got the gun. Heard Garret say nothing at the time; was very drunk, and down on the ground. Defendant did not try to shoot Garret.

M. D. Hutchinson, for the State, proved, that, the evening after the difficulty, he was with defendant; he said Garret said to him, that he, Garret, was one of the boys that feared no noise; and defendant said that was the first time he knew that Garret had anything against him.

J. M. Davis, for the State, proved that he went after defendant, after Garret was killed; did not find him at home. Afterwards, went to Limestone county, Ala., and arrested him.

Buck Roper, for defendant, proved, that about a year before the killing, he rode out from Pleasant Plains in company with Garret and defendant. Witness rode between them. Garret told defendant "not to laugh at his stirrup leather, if it was a rope." Defendant said he had not laughed at his rope stirrups. Garret said

he was one of the boys that feared no noise, although one hundred and twenty miles from home. He repeated this expression ten or fifteen times. When he used it first, he drew a pistol. Defendant asked him if he wanted a fuss; he said he did. Defendant told him to put up the pistol, he had nothing against him, and he put it up. Garret drew the pistol three or four times. Garret told witness to ride on, that he might settle it with defendant. Witness told him "he would not do so; that he did not want him to kill defendant." This was about a mile from the Plains. When they got to the forks of the road, defendant and witness turned off to go home. Garret got down and hitched his horse to a bush, and pulled out his pistol, and wanted defendant to fight him; defendant rode on, and Garret followed him about one hundred yards. Defendant told him to put up his pistol; was all he said, and Garret put it up. Witness is the nephew of defendant. Garret was about half drunk; he did not present his pistol at defendant

Dick Burnett, for defendant, proved that on the evening of the difficulty detailed by the last witness, Garret came by his house; said he had a fuss with defendant; wanted him to fight it out fair; that defendant run off. Witness told this to defendant four or five months before the killing.

R. M. Dunlap, for defendant, proved that he witnessed the difficulty at Pleasent Plains. He was in the front room of defendant's grocery, with defendant Tillery, and others; saw Garret coming across the street with his gun. Defendant and Tillery both remarked,

John C. Williams *v.* The State.

"Yonder comes Garret for a fuss." All went into the back room, except the defendant, and commenced playing cards for fun. Heard Garret come into the front room, and stop in there for a time, and heard a rattling of glasses. Garret came into the back room and commenced cursing, and said he could beat a certain man at his own game. Tillery soon got up and started out. Garret jumped up, grabbed his gun, and said he would kill them. Defendant jumped over the counter, and went out the front door with Tillery. Witness seized the gun and took the caps off, and gave it back to Garret. Garret went hurriedly to the front door, and asked, "which way have they gone?" Witness told him a contrary direction from that they had gone. Never heard Garret make any threats. About ten minutes afterwards, saw Garret with a pistol belted round him. Garret was drunk. Saw him lying on the ground. Witness knocked him down for striking him. Defendant came up with a gun and said, "kill him." Garret went to Hodges' store, asked if they had gone in there. Hodges met him at the door, and told him, "no, not to come in there; there was some ladies in there." He said he would go in, and presented his gun at Hodges, and snapped it. Hodges was in the act of throwing a weight at him, when witness *hollered* not to throw; there were no caps on the gun. Hodges knocked him down. Defendant put up his gun after the difficulty.

Gillespy Riley, for defendant, proved, that, in 1869, Garret told him, he and defendant had had a fuss the day, and that "if defendant would not shoot it out, or fight it out, it would have to stop right there; but

he ever came to his house to abuse him, as he had done once, he would hurt him." On cross-examination, he said, in the same conversation, that defendant, Tillery, Daniel Hardin and Jim Vickers had come to his house in disguise, and abused him, and if they ever came again, he would hurt them.

Irvin Baker, for defendant, proved, that, last spring was a year, saw Garret with a shot-gun in his wagon. Asked him what he was going to do with it. Said there was a good many squirrels, and he would shoot them if they came in his way. Said he had been run over and imposed upon by men on his own premises, and if it happened again he was going to defend himself, and his wife and children. He did not say it was defendant. Witness told defendant of this. On cross-examination he said, two of the parties in disguise were Daniel Hardin and Jim Vickers. At the time witness told defendant what Garret said, witness says, "he approached me in a rough manner, cursed me, said G–d damn you, hold on there; G–d damn you, don't speak to me again. Said, G–d damn you; I was frightened." Witness then told him what Garret said.

Thomas Allison, for defendant, proved that he was at the still-house on the day of the killing; late that evening heard Garret swear he would kill defendant before sun-set, or defendant would kill him. Said it twice. He did not tell defendant of it. Garret had a pistol—six-shooter, in his right pants' pocket. His conversation with Garret was in the still-house; no one present. It was an hour and a half after defendant left, before Garret left. Defendant came back after-

wards, and told witness Garret was killed up there, and to go and take care of him. Garret left half an hour after he made the threat. Witness said, he did not say to A. D. Anderson, in Fayetteville, on Tuesday last, that Garret said, if defendant ever interrupted him, he would kill him.

A. D. Anderson, for State, proved, that, on last Tuesday, in Fayetteville, Thomas Allison told him that Garret said, if defendant ever fooled with him any more, he would kill him.

The question to be determined upon this evidence, is, whether the verdict of murder in the second degree is sustained thereby. As the jury have found that the defendant was not guilty of murder in the first degree, it it is unnecssary for us to inquire, whether the killing was attended with that deliberation and premeditation requisite to constitute murder in the first degree.

The proof as to the killing by the defendant, with a deadly weapon, is clear and uncontradicted. The presumption, therefore, is, that it was done with malice. This presumption stands until it is rebutted by evidence showing either that the killing resulted from passion produced by sufficient provocation, or, by evidence that the killing took place under circumstances which excused the defendant for taking the life of the deceased, either to save his own life or to prevent great bodily harm.

It is abundantly shown, by the evidence, that there was an old grudge between the defendant and deceased. On the part of the deceased, it is shown that he be-

lieved the defendant, together with others, had visited his house in disguise, and had abused him; in what way the evidence does not show; but it was shown that the abuse was such that the deceased brooded over it, and cherished the purpose of having revenge.

This feeling of revenge is shown to have been cherished by the deceased down to the very moment when he was killed. Almost the last words that he uttered, were, that he would go twelve inches into hell to have revenge.

On the part of the defendant, it is shown that his hostility to the deceased grew out of the difficulty on the road—when the deceased endeavored to provoke him into a difficulty—and out of the conduct of deceased at Pleasant Plains, when he was driven from his house and forced to seek safety in flight. His hostility to the deceased on that occasion was manifested by his approaching him when lying on the ground, knocked down, calling for him to be shot or killed. It was distinctly manifest, only a few minutes before the killing, in his declarations to the two female witnesses, that he had been driven from his home by the deceased, that he had run from him for the last time, and that if deceased came there he would kill him.

An old grudge is, therefore, clearly proven, and the law presumes that the killing occurred on this old grudge, unless the proof shows a new and sufficient provocation—and then the law would presume that the killing was on the new provocation—and if that provocation was sufficient in law to rebut the presumption of malice, the offense would be voluntary manslaughter

or in self-defense, dependant upon all the proof. Was there sufficient provocation for the killing to rebut the presumption of malice? It is not shown that the defendant was informed of the threat made at the still-house, as proved by Allison—if it be conceded that any such threat was made there—and if it was made, and had been communicated to defendant, it would not be such provocation, because no words are regarded as sufficient provocation in law. Defendant admitted to the female witnesses that the deceased had said nothing to him at the still-house, but his conduct there had impressed him with the belief that deceased was seeking to bring on a difficulty. This was not such provocation as excited his passions, and impelled him at once to resent the insult; but it only produced the conviction in his mind that it would be prudent for him to leave, in order to avoid the difficulty which he apprehended.

After the deceased came to the house he spoke only two or three words to defendant, according to the testimony of Edwards, and what these were we are not informed. According to the female witnesses, deceased, when he came up, nodded and said "howdy." It is not certain, by the evidence, to whom he nodded or to whom he said "howdy;" nor is it shown that there was anything peculiar or significant in the "nod." Defendant took no exception to deceased's conduct on that occasion; they went out together and helped to unload the wagon. Up to this point of time, there was no provocation. But the deceased got on his horse and started off, and very soon returned and called for Ed-

wards. While conversing with Edwards about exchanging brandy for bacon, he made the remark that "there was a fellow in the house he would go twelve inches in hell for." The only proof that defendant heard this remark, is, that it was made within eight steps from the house in which defendant was sitting, and as the distance was such that the remark might be heard, it is inferred that he did hear it. If this be true, as significant as the language was, of the malice of the deceased, towards either the defendant or Tillery—for both were in the house, and he had the same cause for hostility to both—yet, the law regards no language, however violent or offensive, as sufficient provocation for taking life. But if defendant heard the offensive remark, the proof shows that it did not excite his passions and impel him to do the killing under the influence of passion; but he rose from his seat and, without getting his gun, stepped to the door and said to the deceased: "You have come for a fuss, and by G—d if you don't mind you can get it." At that time deceased was sitting on his horse; he made no demonstration by drawing his pistol; it does not appear from the proof that he knew defendant had a gun behind the door in the house. He replied: "Just walk out and you can have it. I will give you more than you can take or carry off from here." Without saying more, defendant retired from the door, got his gun, and returned; but even then he did not instantly fire, but said, "are you in the same notion still?" When the deceased saw defendant return with his gun, his only words were, "by G—d, let it come," and thereupon defendant fired and killed him.

There was no manifestation of passion on the part of defendant, and there is nothing shown on the part of deceased which the law regards as a sufficient provocation. We are, therefore, of opinion that the killing was with malice, unless the proof shows that the defendant was in such imminent danger of his life, or of great bodily harm, as will make the killing justifiable in self-defense.

It is insisted for defendant, that the facts in proof bring this case within the principle of *Grainger* v. *State*, 5 Yerg., 459. Judge Catron stated the facts on which his opinion rested, as follows: "Grainger used all the means in his power to escape from an overbearing bully. He was shuddering with fear, and his last hope of protection was defeated when Rainey's door continued closed against him. He shot only to protect his person from threatened violence, and that great. It was certain. Henson sat quietly on the fence; the woman and Rainey did not open the door; they no doubt were afraid of Broach, who displayed the traits of a reckless bully, and would have attacked Grainger the moment he reached him, as well in the house as out of it. From Henson no assistance could be hoped for." Upon these facts Judge Catron said: "Was there malice prepence, in this case of homicide, so as to exclude the benefit of clergy within the 23 Henry 8, c. 1? Did Grainger display a cold, deliberate, and wicked conduct? a heart lost to all social order, and fatally bent on mischief? It can not be believed. He behaved like a timid, cowardly man, was much alarmed; in imminent danger of a violent and instant

assault and battery, and was cut off from the chances of probable assistance."

In the case of *Rippy* v. *The State*, 2 Head, 218, Judge Caruthers, after recognizing the doctrine of *Grainger* v. *The State*, as explained by that of *Copeland* v. *The State*, 7 Hump., 479, because of the perversions and misapplications of that case by advocates and juries, proceeds to lay down the law as follows: "The law on the subject is, that, to excuse a homicide, the danger of life or great bodily injury, must either be real or honestly believed to be so at the time, and upon sufficient grounds. It must be *apparent and imminent.* Previous threats, or even acts of hostility, how violent soever, will not of themselves, excuse the slayer, but there must be some words or overt acts at the time, clearly indicative of a *present* purpose to do the injury. Past threats and hostile actions, or antecedent circumstances, can only be looked to in connection with present demonstrations as grounds of apprehension. To constitute the defense, the *belief* or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the *fear* that it will *at that time* be executed. The character of the deceased for violence, as well as his animosity to the defendant, as indicated by words and actions then and before, are proper matters for the consideration of the jury on the question of reasonable apprehension. Even if sufficient cause to fear does exist, but the deed is not perpetrated under the apprehension it is calculated to inspire, or the fear is feigned or pretended, the defense will not be available.

So a case must not only be made out to authorize the fear of death or great bodily harm, but such fear must be really entertained, and the act done under an honest and well founded belief that it is absolutely necessary to kill *at that moment* to save himself from a like injury. It is scarcely necessary to remark, that a real or apparent necessity, brought about by the design, contrivance, or fault of the defendant, is no excuse."

The law as laid down in *Grainger* v. *The State*, explained, analyzed, and defined, in the case of *Rippy* v. *The State*, must govern the case now before us. The proof of previous threats and hostile acts by the deceased, indicating feelings of settled animosity, and purpose to have revenge, for injuries alleged to have been inflicted on him by the defendant, is abundant. His conduct about a year before he was killed, while riding along the road, repeatedly drawing his pistol, seeking persistently to provoke the defendant into a difficulty, shows clearly that he was then filled with hatred towards the defendant, and eager for a pretext to take his life. His acts afterwards, at Pleasant Plains, when the defendant escaped from his violence by deserting his own house, show that there was no abatement of his hostility to the defendant. His conduct on that occasion, as well as other evidence, shows that when drunk, he was a most violent, reckless and dangerous man.

The fact that his hostility towards the defendant was manifested, in this violent and dangerous manner, while he was drinking, furnishes strong evidence that his hatred, and his desire for revenge, were entertained and cherish-

ed in his sober moments. His declarations at the still-house, and just before his death, indicate distinctly a continuance of his revengeful purpose. That he was a violent, dangerous man, when drunk, however harmless and peacable he may have been when sober, we are fully satisfied. The proof is clear, that for about a year the defendant had been apprized of the violent hatred which the deceased entertained towards him. It is also in proof, that he was informed of the alleged ground of the deceased's hostility. But there is nothing in the evidence, showing whether defendant was guilty of the outrage complained of by the deceased or not; nor is there any thing, showing that defendant ever sought to explain the matter, or to relieve the deceased of his suspicions. But it is in proof, that he knew of the deceased's hostility, and its alleged cause, and also, that the deceased was a dangerous man in liquor. He was so well apprized of these things, that when the deceased approached him at the still-house, and gave him the look described by the witness, drank the vulgar toast, and struck the proof vial in his hand, defendant at once understood these things as being "pitched" at him. To avoid a difficulty, he went to Edwards' house, where he had previously left his gun.

That one inducement with him to go to Edwards' house was, that his gun was there, we think may be fairly inferred, from the fact, that as soon as he reached there, he got his gun, called for powder, and sat down to put it in order; and from the fact, also, that he informed the women at the house, of the difficulty he apprehended, and his purpose to kill the deceased

if he came there. He evidently apprehended that the deceased would come, and he determined to be prepared.

In view of the known violence of deceased's character, when drunk, and of deceased's known anxiety to get defendant into a difficulty, we see nothing which was either imprudent or wrong in the fact, that the defendant left the still-house, went to Edwards' house, and put his gun in order. While we discover nothing indicating cowardice, on the part of defendant in leaving his house at Pleasant Plains, or the still-house, to avoid the drunken violence of the deceased, we can well understand, that even a brave man would have fears from such an enemy as deceased is shown to have been.

That defendant had fears of the deceased, and had good reason to have fears, we think the proof fully establishes. But the important question now presents itself, did he really entertain the fear of death or great bodily harm at the time he fired the gun and did the killing? and did he shoot under an honest, and well founded belief, that it was absolutely necessary for him to kill the deceased at that moment, to save himself from a like injury? To make out his justification, all these things must concur. It is not enough, that defendant honestly believed that his own life was in danger, or that he was in danger of great bodily harm from the deceased, at some future time; but he must have believed that the danger was real *at the time;* that it was apparent and imminent. There must have been words or overt acts at the time of shooting, clearly indicative of a present purpose, on the part of the deceased, to take his life or do him great bodily harm.

The proof is, that after arranging his gun, at Edwards' house, he set it behind the door. After the deceased came to the house, he made no hostile demonstration. He refused to go home, when Edwards advised it, but there is more probability that he declined because he wanted more brandy as he said, than that his purpose in going to the house was to have a difficulty with defendant. He aided defendant, Edwards and Tillery in unloading the wagon. He did nothing and said nothing offensive or indicative of any purpose to attack defendant. He had his six shooter in his pocket, but it remained there. When Edwards gave deceased another drink, he got on his horse and rode off. Defendant and Tillery went into the house. In a short time deceased rode back within eight steps of the house, and called for Edwards. They were conversing about an exchange of brandy and bacon, and in that conversation, the deceased manifested his hatred for defendant, and his anxiety for revenge, by violent language already quoted. At that time defendant and Tillery were both in the house. There was nothing in the language, which indicated any present purpose to disturb the defendant. It was strongly indicative of his hostility, and his anxiety for revenge. If it was heard by defendant, he could not have inferred that he was in danger of an immediate attack. If he did so understand the language, when he stepped to the door and saw the deceased sitting on his horse, with no pistol drawn, and no indication of an intended attack, with Edwards standing by him, he could not have believed that he was in imminent danger. But he probably did suppose,

that the deceased had returned for a difficulty, for he said to the deceased: "You have come for a fuss, and by G–d, if you don't mind you can have it." This remark, as far as we can see, was provoked by no word or action of the deceased. Edwards proves, that at the time defendant made the remark, "you have come for a fuss, and by G–d, if you don't mind you can get it," the deceased "had not said any thing to defendant, or about defendant; that is, did not mention defendant's name." But defendant assumed that deceased had returned for a fuss, and being well prepared, he determined to bring the matter to an issue at once, by telling deceased, "if he did not mind he could have it." The response of the deceased was, "just walk out and you can have it; I will give you more than you can take or carry off from here." The question here arises, was defendant then in such imminent danger, that, for the preservation of his own life, it was absolutely necessary that he should return into the house, and get his gun from behind the door, and step out and shoot deceased? When the deceased responded to him and invited him out, he seemed to understand defendant's remark as a banter or challenge; he said, "just walk out and you shall have it;" but he remained on his horse and made no demonstration of getting ready, by drawing his pistol, or otherwise.

The defendant was in no danger, when he was standing in the door, talking to deceased. It was only on condition that he would walk out, that deceased proposed to let him have a fuss. He had no weapon drawn, and made no attempt to draw one. Much less

was defendant in any danger, after he returned into the house. The deceased could not then hurt him; if he had dismounted and attempted to enter the house, with his drawn weapons, the danger might then have been real, apparent and imminent. But no such thing occurred. He remained on his horse, with his pistol in his pocket, when defendant returned with his gun, and stepped on the puncheons. He was in no danger then, real, apparent or imminent; for he then saw deceased on the horse, with no pistol in his hand. In this situation, with the deceased completely in his power, he asks him, "are you in the same notion still?" When the deceased saw him return with his gun, his only response to the question, was, "Let it come." The defendant instantly fired, and the deceased was dead in a minute—his pistol still in his pocket.

That the defendant did the killing under an apprehension, honestly entertained, that the deceased might, or would, in some of his drunken moments, gratify his thirst for his blood, we think the proof fully shows; but that at the time of the killing, he was in any danger whatever of then losing his life, or that he so believed, the proof wholly fails to show.

We are, therefore, of the opinion that the verdict is sustained by the evidence, and we affirm the judgment.

Frank Riddle *v.* The State.

FRANK RIDDLE *v.* THE STATE.

1. INDICTMENT. *Technical words. Feloniously.* An indictment for murder is good without the use of the words *feloniously* or *unlawfully*.

2. NEW TRIAL. *Juror disqualified. Affidavits.* The Circuit Court refused a new trial upon affidavits showing that a juror made statements before the trial showing that he had formed and expressed an opinion, and was otherwise prejudiced against the prisoner, though it was not shown upon what ground the opinion was based; nor was it shown what he stated on his examination as a juror, no evidence being introduced on the part of the State to explain the facts; held, error.

FROM MAURY.

Circuit Court, May Term, 1871, WM. P. MARTIN, J., presiding.

W. J. WEBSTER, for the prisoner, cited, to the defect in the indictment, *Lucius Witt* v. *The State*, 6 Cold., 6; *Williams* v. *The State*, 8 Hum., 595; 7 Cold., 78; Code, 4597, 4598, 4599; Chitty, 163; 4 Bl. Com., 307; 2 Hum., 78; 10 Hum., 120. As to the prejudice of jurors, *Brakefield* v. *The State*, 1 Sneed, 215; *Mann* v. *The State*, 3 Head, 370; *Troxdale* et al., v. *The State*, 9 Hum., 416; Cooke, 315; 3 Haywood, 159; 4 Hum., 27; 2 Head, 520; 3 Head, 87.

A. C. HICKEY, on the same side: The indictment is defective, because it does not charge to have been committed either feloniously or unlawfully: Arch. Cr Pl., 42; 2 Hum., 78; 10 Hum., 120; 11 Hum., 167 6 Cold., 6; 8 Hum., 585; Chitty's Crim. Law, 242

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Bouv. Law Dic., vol. 1, 517. As to the word feloniously: *Budd* v. *State*, 3 Hum., 483.

Fair and impartial trial: Bill of Rights, s. 9; *Alfred* v. *State*, 2 Swan, 581; *Moses* v. *State*, 11 Hum., 232; 10 Hum., 456; *Henry* v. *State*, 4 Hum., 270; *McGowan* v. *State*, 9 Yer., 184; *Payne* v. *State*, 3 Hum., 375; *Brakefield* v. *State*, 1 Sneed, 215; 1 Swan, 61; 3 Head, 373.

The *onus* is not upon the prisoner to show that the verdict was improper, if the juror is shown to be incompetent: *Sam* v. *State*, 1 Swan, 61.

The Court should have charged on all material points in the record: 2 Swan, 237; 4 Cold., 190.

Attorney General HEISKELL and MYERS, for the State, cited *Williams* v. *State*, 3 Heis., 37; *Dillard* v. *State*, 3 Heis., 260; and attacked the case of *Witt* v. *State*, 6 Cold., 6, as being decided without reference to the Code.

The word felonious does not occur in the definition of murder, Code, 4597. The Code does not declare, as the act of 1829 did, that the offenses described therein are felonies. Felony is a word of unknown meaning: 1 Arch., 1; Russ. on Cr., 43. It will not supply the word maliciously: *Killenbeck* v. *State*, 10 Md., 431; *State* v. *Gove*, ——; *State* v. *Cord*, 34 N. H., 510; *Rex* v. *Turner*, 1 Moody, C. C., 239.

The Code, 5115, dispenses with technical words, and declares that it is not "necessary or proper" to use words "not essential to constitute the offense." The essentials to constitute murder are, 1 willful, 2 deliberate, 3 malicious, 4 premeditated, killing. If felonious adds

anything to these, it adds what is *not essential.* If it adds nothing to the meaning, it is useless repetition, or nonsense. Every unlawful killing, with malice, is murder; but these circumstances are matters far beyond *unlawfulness*, and necessarily include it. Cited *Anderson* v. *State*, 5 Ark., 444.

Courts may modify forms: *Lamden* v. *State*, 5 Hum., 83; *R.* v. *Mosley*, 2 Arch., 888, n.; where an order of Lawrence, J., is recognized as an authority for changing the form of an indictment.

Indictment may follow statute: *State* v. *Ladd*, 2 Swan, 226. Improvements are to be favored: *Isham* v. *State*, 1 Sneed, 115.

On the competency of the jury, they cited *Norfleet's Case*, 4 Sneed, 342, where it was held to be error to discharge a juror, unless it *appeared* that he had formed his opinion from more than rumor: Major's case, *Ib.*, 608, Mann's case, 3 Head., 375, is full on this question. Riddle's affidavit in this case shows that the juror qualified himself on his examination. It does not show that he did not make a statement consistent with the affidavits as to his declarations. The Judge below heard the whole case, and acted upon that. This court has no information what appeared on the *voir dire.* It can not see that there is error. Reviewed Howerton's case, Meigs, 262; *Troxdale* v. *State*, 9 Hum., 416; Brakefield's case, 1 Sneed, 215; *Norfleet* v. *State*, 4 Sneed, 342; *Mann* v. *State*, 3 Head., 373.

The error must appear: *Ewell* v. *State*, 6 Yer., 374; *McClure* v. *State*, 1 Yer., 206; *Jarnigan* v. *Mairs*, 1 Hum., 479; *Nolen* v. *Wilson*, 5 Sneed, 340, and cases there cited;

Large v. *Dennis*, 5 Sneed, 597; *Currier* v. *Bank of Louisville*, 5 Cold., 464; *Isham* v. *State*, 1 Sneed, 114, 115.

Cited numerous authorities from other States, to the point that objection to a juror *propter defectum*, is no ground for a new trial; and from this State, *McClure* v. *The State*, 1 Yer., 213, 214; 6 Yer., 375; *Gillespie* v. *The State*, 8 Yer., 507; 1 Hum., 253, 259; 10 Yer., 530.

TURNEY, J., delivered the opinion of the Court.

The plaintiff in error, with one Griffin, was indicted in the Circuit Court of Maury county, for the murder of Samuel Friedman.

That part of the indictment necessary to be remarked upon, is in the language: "Did willfully, deliberately, premeditatedly, and of their malice aforethought."

There was a severance, the plaintiff was put upon his trial, convicted of murder in the first degree, and sentenced to be hung. There were motions for a new trial, and in arrest of judgment; both having been overruled, an appeal was taken to this court.

It is first objected, that the court erred in overruling the motion in arrest of judgment, because neither the word unlawfully nor feloniously, is used in the indictment, describing the crime.

The statute describing murder in the first degree is as follows:

"Every murder perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or in the attempt to perpetrate, any ar-

son, rape, robbery, burglary or larceny, is murder in the first degree:" Code, 4598. At common law, there is but one kind of murder. Our statute has divided and defined murder into two kinds. The seeming difficulty, presented in argument upon the phraseology of the indictment, comes, it occurs to us, of an oversight of the history of the crime of murder, and the reasons for the practice of the courts in several ages in its trial.

Blackstone, B. 4, p. 194, says: "The name of murder, as a crime, was anciently applied only to the secret killing of another, which the word *moerda* signifies in the Teutonic language, and it was defined, '*homicidium quod nullo vidente, nullo sciente, clam perpetratur*,' for which the vill wherein it was committed, or if that were too poor, the whole hundred, was liable to a heavy amercement, which amercement itself was also denominated *murdrum*. This was an ancient usage among the Goths in Sweden and Denmark, who supposed the neighborhood, unless they produced the murderer, to have perpetrated, or at least connived at, the murder; and, according to Bracton, was introduced into this kingdom by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English, and was afterwards continued by William the Conqueror, for the like security to his own Normans; and therefore, if, upon inquisition had, it appeared that the person found slain was an Englishman, the presentment whereof was denominated englescherie, the country seems to have been excused from this burthen. But this difference being totally abrogated by Stat. 14, Edward 3, c. 4, we must now, as observed by Staunforde, define murder in quite another manner, without

regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction."

We think there can be no reasonable doubt of, or objection to, the authority of the law-making power in the State to create new offenses, re-defining, or re-describing, those of the common law, by adding to, or taking from, the ingredients required by it, thereby making the offense a statutory one. And, while we have appropriated by statute Sir Edward Coke's general description of murder in almost identical terms, changing them barely for adaptation to our peculiar institutions, still we have gone further, and in specific language, described murder in the first degree, thereby totally abrogating the use of such descriptive forms of the common law, and of other States, as are not preserved by our statute, and making it necessary only to describe the crime in the words of the statute, or in words of equivalent or more comprehensive import. We have arrived at this conclusion through a reasoning suggested by the common law.

There is no error in overruling the motion in arrest of judgment.

It is next objected: The court should have granted a a new trial, because of the incompetency of the juror, Richard Burnet. In support of this objection, the affidavit of A. O. P. Nicholson, Jr., is relied upon, and is as follows: "That Richard Burnet, who sat as a juror on the trial of Franklin Riddle, who was tried for murder at the present term of this court, had, previous to said trial of defendant, expressed an opinion that said Riddle was guilty, and should be hung. He also expressed an

opinion that Riddle had stolen a mule from him, and then detailed some of the circumstances of the case against Riddle for murdering the pedlar, and expressed the opinion above referred to, to affiant, in conversation about the case; that he did not communicate the above facts until after the trial of the case, either to the defendant above referred to, or his counsel."

In answer to this, it is insisted that, as the record shows that the juror qualified himself on his *voir dire*, the law presumes that he did so by a statement of his condition, making known his convictions and the reasons thereof. We can not agree to this conclusion.

The constitution guarantees to the accused, in all criminal prosecutions by indictment or presentment, a speedy, public trial, by an impartial jury; and while this provision has been interpreted not to exclude as a juror a party who has formed or expressed an opinion from rumor, but is able to divest himself of all prejudice and influence of such opinion, (a rare ability of difficult exercise, and more difficult to be understood;) still, the qualification of the juror is an affirmative proposition, held and to be made good by the State, and we dare not presume its correctness as against the life or liberties of a citizen, especially when a strong *prima facie* case is made against it, and no effort to sustain it.

If it had appeared that the juror did, upon his *voir dire*, qualify himself under the rule already stated, still he would have come under the rule that jurors may be challenged, *propter affectum*, for suspicion of bias or partiality, or for a cause carrying with it *prima facie* evidence of malice or favor.

While the juror might have qualified himself by re-

sponses to the usual questions touching opinion based upon rumor, yet he has malice toward the accused, predicated of the fixed conviction that he had stolen his, the juror's, property. With a juror so circumstanced, we are not prepared to hold the prisoner could have that impartial trial assured to him by the Constitution.

Reverse the judgment.

PHILIP MAPLES *v.* THE STATE.

1. INDICTMENT. *Entry of finding and return.* The entry of record of the return of the indictment into court is sufficient, without showing that it was into *open* court.
2. VENUE. *Proof of.* Venue may be proved by reasonable inference from facts shown.
3. POISON. *Proof of.* On a trial for poisoning, proof that the party injured was *poisoned* with a drug named, is sufficient to show that the drug used was *poison.*
4. CONFESSIONS. *Inducements to confess, &c.* Where the prisoner, on his arrest, was told by one of the arresting party, "we know that you are not at the head of this, and if you will tell all about it, it will be best for you, and may release you;" whereupon the prisoner confessed; and on the next day, he went to a witness who did not have charge of the prisoner, and said he wanted to make a statement or confession about it, when he was told that he could not be compelled to tell, and if he did, he must do it voluntarily, and that his statements would be evidence against him; the confession made to the latter was held admissible.

Cases cited: *Fields* v. *State*, Peck, 143; *Deatheridge* v. *State*, 1 Sneed, 75; *McGlothlin* v. *State*, 2 Cold., 223.

FROM GILES.

Circuit Court, August Term, 1871. WM. P. MARTIN, J.

Philip Maples *v.* The State.

JAS. M. QUARLES, for the prisoner, in addition to the points noticed by the Court, objected that the bill of exceptions stated, that the judge in his charge read to the jury sec. 4626 of the Code, but did not set it out in his charge.

Attorney General HEISKELL, for the State.

FREEMAN, J., delivered the opinion of the Court.

The prisoner was indicted in the Circuit Court of Giles county, for an attempt to commit the crime of murder in the first degree, on Richard Allen, by administering "a certain deadly poison called strychnine."

He was convicted and sentenced to the penitentiary for three years; and brings his case to this court by appeal, in the nature of a writ of error.

The first objection relied on is, that the indictment is not shown to have been returned into open Court.

The answer to this is, that it does appear that "the grand jurors aforesaid returned into court an indictment against Philip Maples for an attempt to commit murder in the first degree, in words and figures as follows," &c. We can not well understand how this could have been done, unless the court had been in session. They might have returned it to the Clerk's office, or into the court room, without this; but not into court, unless the court had been open.

The next objection is, that there is no proof showing that the offense was committed in Giles county.

There is nothing in this objection, as we think the proof does show the offense was committed in that

county. Dr. Beatty proves, that he resides in Elkton, Giles county; had a negro, he says, "in my employment, in May, 1870, named Richard Allen, who stayed in a cabin in the yard; was called up to see the negro, and found him in the cabin," &c. The fair construction of this language is, that this occurred at his residence in the county as stated, especially as no effort is made to prove the contrary.

It is then insisted in argument, that there is no proof that strychnine is poison. The witness, Dr. Beatty, however, states distinctly, after giving the symptoms which he observed, that he was satisfied he had been poisoned by strychnine. How a man can be poisoned by strychnine, and yet strychnine not be a poison, we have been unable to see.

The point, however, most seriously pressed on us for reversal, is, that certain confessions made to Dr. Beatty by the prisoner, were improperly admitted.

The facts, as detailed by the witness, are, that "the next morning after the poisoning occurred, Dr. Beatty went to the magistrate's office, where," he says, "he found the prisoner under arrest, as well as Dick Brown, another negro implicated in the poisoning. They were about to go into the trial or investigation of the matter, when Maples came up to me and said he wanted to make a statement or confession to me about it; that he wanted to tell me all about it. I told him he was not bound to do so, and could not be compelled to do it; and if he did tell it, he must do so voluntarily; and I stated to him that any admissions he might make would be testimony against him on final

trial, but he said he wanted to tell it." At this point counsel for the prisoner objected to the witness making any statement as to a confession made by the prisoner, and offered to introduce witnesses (one of them being one of the State witnesses, then under the rule) to show that the alleged confession was made under such circumstances that it ought not to go before the jury, and could not be used as evidence. The court overruled the objection, refusing to suspend the examination of the witness, and permit the introduction of such testimony, but allowed the confession to go to the jury, ruling that if afterwards the prisoner could show that the confession was made under such circumstances as rendered it incompetent, the court could withdraw it from the jury.

A remark of the court in the case of *State* v. *Fields*, Peck R., p. 143, is relied on to sustain this objection. It is as follows: "It is the opinion of the court, that testimony should, in sound discretion, be inquired into, with a view to its competency, and rejected, rather before it is stated to the jury by the witness, than afterwards, for fear of impressions that can not be effaced, after the evidence should be decided to be incompetent and improper for the jury to hear." This rule we think a sound one, and feel no disposition to change it; but still, under the rule, it is a matter of sound discretion in the presiding Judge, and one which, in the practical administration of justice, can be safely confided to him; and we could not reverse a case where such discretion has been exercised, unless we could see that it has been abused, and exercised to the injury of a

prisoner, under circumstances unwarrantable and improper. We do not think this is such a case.

S. Denivant was introduced in the progress of the trial, for the prisoner, who stated that he helped to arrest the prisoner on the night of the alleged poisoning; helped to guard him that night; that Mr. Baugh commenced talking to him, and said, "we know that you are not at the head of this, and if you will tell all about it, it will be best for you, and it may release you."

Thereupon the prisoner made a confession of it to Mr. Baugh; says he was not present the next morning when Dr. Beatty talked with the prisoner.

The counsel of the prisoner then moved the court to withdraw from the jury any evidence of the confession made to Dr. Beatty, previously referred to in this opinion. The court refused to do so.

The rule of law on the subject of admission of confessions is, perhaps, as well stated by this court, in case of *Deathridge* v. *The State*, as it can be found anywhere. It is: "If a confession be free and voluntary, if it appear to proceed merely from a sense of guilt, and not from the influence of hope or fear in any degree, it is competent evidence. Great weight is due to a confession of this kind; for we are to presume, in the absence of influence or motive, a person who is innocent of crime will not confess himself guilty. But if the confession be the result of hope or fear, induced or excited by a person having power over the prisoner, it becomes incompetent; for in such case it can have no tendency to prove the prisoner is guilty of the crime."

Philip Maples *v.* The State.

The case of *McGlothlin and Buntin* v. *The State* is cited to sustain the objection here relied on. That was a very different case from this, for the confession was made to the magistrate with the threats and promises being uttered almost at the time the confession was made; in fact the court say "they were continued from the time of the arrest, during the trial, during the time they were making the confessions, and up to the time of their conviction." Under these circumstances, the confessions were clearly extorted, and not voluntary, and were properly excluded.

But, in this case, the confession was made to Dr. Beatty, about 9 o'clock next morning after he had confessed to Baugh. Dr. Beatty did not have charge of him; had just come to the place of trial; probably knew nothing of the promises made, or of the confessions.

The prisoner went to him voluntarily, and told him he wanted to make a statement to him about it. He told the prisoner he was not bound to do so, could not be compelled to do it, and if he did he must do it voluntarily, and that what he said would be used as testimony against him on final trial; but prisoner said he wanted to tell it, and did so.

We think in such a confession we have all the guaranty for its truthfulness that can be had in such a case. We see it was voluntary, after being warned of the consequences and informed of his rights, and that he could not be compelled to do so. Yet, with all this, he insisted on making the confession. We can see no rule of law on which such a confession can be excluded. The witness seemed to have acted

in the humane spirit of the law, requiring confessions to be voluntary, and even giving the party full knowledge of his rights, and warning him of the danger that such confession would be used against him on final trial, so that he had no inducement or advantage held up to him; on the contrary, the opposite effect clearly presented. Such a confession is clearly competent

We may add, that the prisoner's guilt is proven beyond all doubt or question, and we affirm the judgment of the court.

Calvin Logston *v.* The State.

1. Change of Venue. *Order for.* On the entry of the order changing the venue in a criminal case, the jurisdiction of the court to which the venue is changed attaches, subject to the right of the court making the order, to vacate it during the term at which it is made. The filing of the transcript is matter of evidence.
2. Same. *Filing Transcript.* If a transcript is filed with the indictment, sufficient to show the jurisdiction of the court to proceed, the trial may in the absence of objection go on, and any deficiencies in the transcript may be afterwards supplied by *certiorari.*
3. Evidence of. *Substantive felony when admissible.* Upon the trial of an indictment for the murder of one person, the fact that other dead bodies were found at the same time and place with that of the person charged, is admissible, to negative the hypothesis that they were parties to the homicide.
4. Same. *Witness. Age and capacity.* A witness of tender years being asked if he knew what would become of him if he swore a lie, answer-

ed, "that the bad man would get him." *Held:* That in view of his intelligence, as shown by his evidence, in chief he was properly admitted as a witness.

5. CHARGE OF COURT. *Description of matter read.* It is not a ground of exception to the charge of the Circuit Judge that the bill of exceptions shows that he read certain sections of the Code, designated by their numbers, without setting out the sections at large in the bill of exceptions.[1]

FROM OVERTON.

Indictment in the Circuit Court of Fentress. Change of venue to Overton. Tried at June Term, 1871, S. M. FITE, J., presiding.

The indictment was for the murder of Catharine Galloway. She was found, on the 20th day of November, 1868, lying dead, with mortal wounds on her body, in the house where she lived with her mother, Lucy Galloway, and two children. The bodies of these were found at the same time and place, all dead but the witness, James, who, after the lapse of two days, during which time he lay in a state of insensibility, recovered. The indictment was for the murder of Catharine Galloway alone.

The bill of exceptions showed that the Judge, in his charge, read Sections 4597 to 4605 of the Code, inclusive, but did not set them out *in hæc verba.*

E. L. GARDENHIRE, for the prisoner, cited *Calhoun* v. *State*, 4 Hum., 477; 2 Meigs Dig., p. 1022. He insisted on the fact that there was a variance between the en-

[1]See *ante*, 409, *Maples* v. *State*, where the same point was raised in brief.

dorsements on the indictment, as certified in the first transcript and the last, one describing the prosecutor as James H. Story, the other as J. H. Story, and insisted that this was matter of essential description, citing Greenl. Ev., § 58. Insisted that the evidence as to finding the other dead bodies at the same time and place, with Catharine Galloway, was improperly admitted, citing *Kinchelow* v. *State*, 5 Hum., 1; *Peek* v. *State*, 2 Hum., 86; *State* v. *Stone*, 4 Hum., 27. On the competency of James Galloway, he cited *State* v. *Doherty*, 2 Tenn. R., 79; 1 Phil. Ev., 9, 12, p. 8; *People* v. *McNair*, 21 Wend., 608.

Attorney General HEISKELL, for the State, cited *Vincent* v. *State*, 3 Heis., 120.

TURNEY, J., delivered the opinion of the Court.

The first reason assigned for a new trial, is, that a complete transcript of the record and proceedings of the Circuit Court of Fentress county, in which the indictment was preferred and found, and in which the crime of murder is alleged to have been committed, had not, at the time of trial, been transmitted to the Circuit Court of Overton county, to which the venue had been changed.

This objection is not well taken. The order of the court making the change of venue at the instance of the accused, together with the indictment, had been transmitted. The order of the Court in Fentress county authorized the Circuit Court of Overton county to proceed with the trial. On the presentation of the

case the only duty of the Court was to see that the Court first having jurisdiction of the cause had made the order changing the venue.[1]

Then, the indictment being presented and no objection made by the accused or his counsel, the Court was authorized and obliged to proceed with the trial.

The statute enacting, "Upon making an order for the change of venue, the Clerk shall make out a full and complete transcript of the record in said cause, and transmit the same, together with the indictment and all other papers on file, to the Clerk of the court to which the venue is changed, which transcript shall be entered on the minutes of the Court," is, as to the transmission, merely directory to the Clerk, and is in no way necessary to the jurisdiction of the court to which the venue has been changed. So soon as the order has been made, and before any paper or proceeding has been transmitted, the jurisdiction of the second court attaches, and that of the court making it, is lost upon its adjournment.

It is not the filing, but the making of the order that confers the jurisdiction. The indictment is the cause, and when the two come to the knowledge of and custody of the court, as was the fact here, everything necessary to a trial has been done.

Under a contrary rule, a case which had been pending in a court for a great many terms, would seldom be tried properly in another court on change of venue, as "a full and complete transcript of the proceedings" would embrace every order of every kind and for every

[1]See acc. *Adams* v. *State*, 1 Swan, 466.

purpose, including adjournments, recesses, respites, swearing of constables in charge of jury, &c. So that, after everything that could reasonably have been found was transmitted, it would probably come to pass that some order of, in fact, no moment, had escaped the clerk, and therefore a new trial must be had.

Such a rule would impose upon the court an impossibility—that is, to know that every minute, important and unimportant, as well as every subpœna, affidavit, &c., entered of record or issued from or filed in the court whence the cause came, was before it. The purpose of the law is to insure speedy and impartial trials, and not to put it in the power of parties accused of crime to complicate and interminably delay investigation.

The testimony of J. H. Story, giving the condition and appearance of other dead bodies in the house, was competent. It was the duty of the State to show, and the right of the jury and the public to know, a full description of the premises in which the body of Catharine Galloway was found, including persons and things present, for the purpose of showing, or aiding to show, the manner and instrument of her death. The fact that persons who had been with her were dead, tended to destroy the hypothesis of their guilt, as inconsistent with the guilt of the accused. For such purpose the testimony was clearly admissible, and the court having so, in substance, instructed the jury, and that it could not look to it as evidence of a substantive offense; and having also, in proper terms, cautioned it against its illegitimate influences, it is not for

us to attend to the argument that it may have aroused the jury to indignation, induced them to give undue weight to facts proven, and induced them to inflict a greater measure of punishment. We must content ourselves with the proper ruling and charging of the law.

James Galloway, a witness, about eight years of age, was objected to because of his tender years and for want of proper instruction. The court asked the witness if he knew what would become of him if he swore a lie? He said, "Yes; the bad man will get me." He was then asked who told him so. He said his mother. While, as a general rule, it might have been proper to have further tested the witness, yet, in view of his remarkably intelligent testimony, we are satisfied the manner of the child was of a character to satisfy the court of his capacity and instruction, and justified the brevity of examination by the court. The sensible answers make it clear that the witness understood sufficiently the nature of an oath and had a well defined idea of future rewards and punishments. His candor in speaking of his testimony, given on former trials, discovers an honesty the absence of which in many older and more mature persons, is to be regretted.

It is next objected that the court erred in not committing to writing that part of his charge embracing the Code 4597 to 4605, inclusive. The record shows the court read these sections to the jury, referring to them by number and book. This was sufficiently definite, and there can be no mistaking what was read and for what purpose it was read. It is not a refer-

ence in general terms to any statute, but in specific and concise words. These sections describe the different degrees of homicide. Besides, his Honor gave additional instructions defining the meaning of the terms descriptive of the offenses.

The reading of the statute with the additional explanation, was a declaration of the whole law applicable to the case.

The charge is eminent for fullness and clearness.

The confessions were made freely and voluntarily, without the least inducement of hope or fear.

There is no error in the conviction for murder in the first degree, or the judgment of death.

The facts point distinctly and unerringly to the plaintiff in error.

Affirm the judgment.

Eli Maxwell *v.* The State.

1. Assault to Murder in first degree. *Evidence of design to kill.* Where four negroes, after a rencounter with two white men and a negro, followed them, armed with guns, with an expressed purpose to kill the negro and to have revenge on the white men, and went to the house where the negro lived, and enquired for him, when they were confronted by the white men and asked, "what's up now?" when one of the prisoner's party said, "Nothing, G–d d–m it, we will show you," and fired; it was held, that the evidence not establishing a specific intent to kill the prosecutor, and the shooting being so sudden that there was no

time for consultation between the person firing and the prisoner, the previous design to kill the particular individual assaulted was not established as to the party; and that the intent, if formed in the mind of the individual assailant, was not brought home to the prisoner by any expression or act of his at the time of the shooting.

2. EVIDENCE. *Motives of witness.* Where there is a material discrepancy in the statements of witnesses, if one witness has a strong motive; as to forestall a prosecution against himself; to misstate, or give a coloring to the facts, while the other is free from any apparent motive; these are circumstances to be weighed in considering the effect of the evidence, which may cause the latter to overweigh the former witness.

FROM COFFEE.

Circuit Court, September Term, 1871, before W. P. HICKERSON, J.

B. M. TILLMAN, for the prisoner.

Attorney General HEISKELL, for the State.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiff in error and three others, (all colored,) were indicted in the Circuit Court of Coffee county, for an assault with intent to commit murder in the first degree, upon Leander Carden, (prosecutor,) and William Keele. Defendant alone was tried, the other three having fled the country. The defendant was found guilty, and sentenced to three years' imprisonment in the Penitentiary; from which judgment he has appealed. We find no error in the record, either in the admission or rejection of evidence, or in the charge of the judge, on which the defendant is entitled to a new trial. The only question which we deem it necessary to examine, is, whether the evidence was sufficient to support the finding of the jury.

Eli Maxwell *v.* The State.

The facts necessary to be noticed, are as follows: On the evening of the day on which the assault is alleged to have been made, defendant, in company with two other colored men, (Alfred Davis and David Love,) was returning from his work towards his home, when they met the prosecutor, Leander Carden, W. C. Carden, Wm. Keele, Granville Keele, Richard Henly, and a colored man named Henry Keele. Defendant had fallen behind the other two, when they met and passed the prosecutor and his company. It appears that, for some reason unexplained, when the prosecutor and his company met defendant, they got into some difficulty, which resulted in the defendant running, and their pursuing him to the house of Alfred Davis. When they reached Davis' house, near to which was defendant's, they first assaulted and beat David Love, and then they fell upon Alfred Davis, and beat and cut him in a cruel manner. Soon after the prosecutor and his company left, defendant came up and was immediately sent for the doctor to come and visit Alfred Davis. While he was gone, Riley Love, (colored,) came to his house and took away his gun. It appears that soon after the prosecutor and his company left Davis' house, four colored men, Riley Love, Rolly Neill, John Osborn and Horace Armstrong, followed after them on the look of Henry Keele, the colored man who was engaged in the riot at Davis'. Defendant said to a witness, that they were looking for Henry Keele to *punish* him. They passed by Mrs. Keele's, where the prosecutor and several of his company lived. At the time they passed, the prosecutor and his company were eating supper. The four negroes passed without stopping or making any in-

quiry, and went about one hundred yards farther, to the house of Julia Bailey, where Henry Keele lived. She says she saw but four men in the yard. She knew but two of them—Horace Armstrong and Riley Love—don't know that defendant was there—she had not known him, and could not now say that he was one of the men there.

She asked them what they wanted; they said, "nothing—no harm;" they then asked if Henry Keele was there. She answered, "no, and she did not know where he was." They then asked, "where is Tobe and Bill?" They then said, "Come, let us go." Just after that, she saw some person or persons coming up the lane from towards Mrs. Keele's, and soon saw prosecutor and Mr. Keele walking up near the gate, and heard prosecutor say, "Boys, what's up?" or, "what's up now?" and they replied, "Nothing." She saw that the prosecutor had a gun, and about this time she went into her house, and neither heard nor saw any thing more.

The prosecutor proves, that after the negroes passed Mrs. Keele's, he heard the dogs barking, and the talking at Julia Bailey's. The prosecutor took his gun, and in company with Mr. Keele, went up to Julia Bailey's, remarking that he would go and see what was up. When they reached the gate near the house of Julia Bailey, he saw four or five men standing in the yard; he is not certain whether there was more than four; thinks he saw three guns in their hands; he could not tell who any of them were; could not say that defendant was there. When they walked up to the gate, prosecutor asked: "Boys, what is up now?" Some one remarked, or re-

plied: "Nothing, G—d damn it; we will show you;" and immediately after, prosecutor observed a gun being raised, and jumped behind the gate post. Keele also ran behind a post, and soon the gun was fired. Prosecutor said, "If that is your game, I'll help you," and immediately fired, and then another time, and a third fire from the other side. After prosecutor fired the second time, he and Keele ran off; and as they ran off, another gun was fired. Prosecutor said he aimed to do execution, and afterwards found a dead negro there. Horace Armstrong was the negro killed.

Another witness proves that after Horace Armstrong was killed, defendant told him he was up there, but that he had nothing to do with the shooting.

Defendant said to the doctor, on his way to see Alfred Davis, talking about Henry Keele and the Cardens, and other white men, that he would have revenge if he had to burn up Panhandle Creek.

Thomas Davenport proves, that on the night after the affray at Alfred Davis', the several negroes indicted were at his grocery, wanting whisky. He would not sell it without the money. They were talking about the Cardens, and other white men, and one negro named Henry Keele, having been engaged in the affray; and were talking about going up to Crossland Branch, and threatened they would kill the negro and make mince meat of the others. He could not state that defendant made any threats; is not certain that he did. They were all three together, and talking, but can not be certain that defendant, or which ones, used threatening words.

It was in proof that all the parties charged in the

indictment fled from the county, except defendant; that he had remained, and that he was of good character.

The proof, as it is presented in the record, makes out a most wanton and unprovoked assault and battery by the prosecutor and his company, upon David Love and Alfred Davis. It was well calculated to arouse the worst passions of the parties abused, and their colored friends. It was especially calculated to excite them against one of their own color, who seems to have taken an active part in the assault and battery. If the injury had been resented immediately, the consequences, whatever they might have been, could hardly have amounted to murder in the first degree. It was fairly left to the jury, whether the shooting which afterwards occurred at Julia Bailey's, took place under the passion provoked by the assault and battery at Davis'; or whether it was made with deliberation and premeditation, after the passions had time to cool. The jury found that the assault, at Julia Bailey's, was made after sufficient cooling time to deprive the defendant of the benefit of the defense of having acted under passion produced by recent provocation.

We think the evidence justifies their conclusion as to this point in the case. The proof leaves no room to doubt as to the presence of defendant when the shooting took place. He distinctly admitted to two witnesses that he was present; and it is proved by another that he was in company with the other parties indicted when they were probably on their way to the place where the shooting occurred.

But the questions of difficulty are: First, with what intent did defendant go to the place; and second, if he

did not go there with the intent to kill and murder the prosecutor and Wm. Keele, as charged in the indictment, was the assault made upon such intent formed after reaching the place of the shooting?

The charge is, that defendant assaulted the prosecutor and Wm. Keele with intent to commit murder in the first degree.

Defendant said to the doctor that, "he would have revenge, if he had to burn up Panhandle Creek;" and to Davenport, some of the four indicted—all talking together—said, "they would kill the negro Henry Keele, and make mince meat of the others." Although it is not shown that defendant made this threat, yet it was made in his presence, and he made no dissent. It is in proof that the parties indicted passed by the house where the negro Henry Keele was living. When they reached the house of Julia Bailey, they first asked for Henry Keele, the negro, and not finding him, they then asked where Tobe and Bill were, (meaning, as we infer, the prosecutor and Wm. Keele.) This proof makes it certain that the four negroes indicted started out armed, for the purpose of having revenge. Their object was, first, to take revenge upon Henry Keele, and that was clearly their purpose in going to Julia Bailey's, where he lived. It is clear, also, that they intended to have revenge on Henry Keele, by taking his life. The proof shows, also, that they had formed the purpose to take revenge on the prosecutor and Wm. Keele, but it is not apparent what was the measure of revenge contemplated as to them. They threatened "to kill Henry Keele," the negro, but "to make mince meat" of the white men. This may have

meant, and probably did, that they would inflict great bodily harm on them; or, as defendant said to the doctor, "would have revenge by burning up Panhandle Creek." We are, therefore, not satisfied that the intent with which defendant went to the house of Julia Bailey was, to take the life of the prosecutor and Wm. Keele.

But, in the second place, when the prosecutor and Wm. Keele were fired at from Julia Bailey's yard, was it done with the deliberation and premeditation which were necessary to constitute murder in the first degree; and did defendant concur in this intent? It is to be observed that the four negroes indicted passed by the house where the prosecutor was, without stopping or making any hostile demonstration, nor had they indicated any criminal purpose after reaching Julia Bailey's house.

The prosecutor and Wm. Keele were induced to follow them by hearing the barking of dogs and the talking of the negroes. The prosecutor arms himself, and takes Wm. Keele with him, and follows on to see what is up now. Julia Bailey tells what occurred before the prosecutor arrived. The four negroes asked for Henry Keele. Upon finding that he was not there, they asked where Tobe and Bill were. She saw the prosecutor and Wm. Keele approach the gate, and heard the prosecutor ask, "Boys, what's up now?" and the reply, "Nothing." This is all she heard or saw. She did not hear the remark, "G—d damn it, we will show you," which the prosecutor says was made a part of the reply to his question, "Boys, what's up now?" She saw nothing of the raising of the gun by one of the four negroes in the yard, which the prosecutor said occurred "immediately

after" the reply to his question. Julia Bailey says that she went into her house about the time the prosecutor asked, "Boys, what's up now?" but she heard the reply, "Nothing." She was standing at her door. The negroes, as stated by the prosecutor, were in the yard, between the gate and the house. Yet Julia Bailey heard nothing of that part of the reply, "G—d damn it, we will show you;" nor did she see any of them raising his gun, down to the time when she entered her house and closed her door. Nothing had been said or done, as far as she saw or heard, which indicated any purpose to make an assault upon the prosecutor and Wm. Keele. The case, then, turns upon the evidence of the prosecutor and Wm. Keele, alone. It must be borne in mind that the prosecutor admits he shot and killed one of the four negroes—Horace Armstrong. It must be remembered that the prosecutor and Wm. Keele had just reached home, after having made a most brutal attack upon David Love and Alfred Davis. It must also be observed that there is no satisfactory reason given why the prosecutor armed himself and followed the four negroes to Julia Bailey's. The result of this going there was, that shooting took place, in which the prosecutor killed the negro, Horace Armstrong. We are bound to weigh the evidence of the prosecutor and Wm. Keele in the light of the surrounding circumstances. Although they escaped unhurt, and have killed one of the negroes, a prosecution is commenced against all of the other negroes for an assault with intent to commit murder. All except the defendant, fly from the country. The defendant, being prosecuted, can not testify. The whole

case, therefore, rests with the two witnesses, whose highest interest is, that defendant shall be convicted; for, if the four negroes are not guilty of the charge of assault with intent to kill, then the presumption is strong, that the prosecutor and Wm. Keele are guilty of felonious homicide. Under such circumstances, we feel bound to emphasize the fact that the prosecutor's evidence is not sustained by that of Julia Bailey, as to the reply of the negro, "G—d damn it, we will show you," nor as to the fact of one of the negroes raising his gun immediately after the reply was made. From her location, Julia Bailey ought to have heard this part of the reply as well as the first, and she ought to have seen the raising of the gun. In view of the several circumstances calculated to detract from the evidence of the prosecutor and Wm. Keele, we are not fully satisfied that the jury were justified in returning a verdict of guilty on the evidence.

But assuming that the facts as to the origin of the shooting are entirely reliable, we are not satisfied that it took place with that deliberation and premeditation necessary to make out the charge in the indictment. The fact that the prosecutor and Wm. Keele followed the negroes to Julia Bailey's; that they were two of the men that just before had assaulted and beaten and stabbed one of their color, and that they approached them armed, may very well have produced the impression that their purpose was to make another attack. We can not see that there was any time for deliberation, or that there was any premeditation; and especially we see no ground to assume that there was any con-

sultation, or any concert of action among the four negroes. The prosecutor represents the reply of one of the negroes to his question, and the act of raising his gun, as almost simultaneous. It has the appearance of a sudden, hurried attempt to get the first shot, to avoid an apprehended attack. There could have been no time for consultation; nor can we see that there was that deliberation and premeditation necessary to make out the charge. We are not satisfied by the proof that the defendant participated with that deliberate and premeditated intent which it is incumbent on the State to make out in such a case. We are, therefore, of opinion that the Circuit Judge erred in refusing a new trial.

Let the judgment be reversed, and a new trial awarded.

Duncan Mayes *v.* The State.

Constitutional Law. *Venue.* The Code, 5242, sub-sec. 9, which prohibits the reversal of a judgment "because the Bill of Exceptions omits to state that the venue was proven in the court below," is contrary to the Constitution: Art. 1, s. 9.

FROM MAURY.

Error to the Circuit Court. Judgment, June Term, 1871. Wm. P. Martin, J., presiding.

Duncan Mayes *v.* The State.

W. H. TIMMONS, for the prisoner, insisted that the Code, 5242, sub-sec. 9, is contrary to the Constitution. That the right of trial by a jury of the county was secured by *magna charta*, c. 29; 4 *Bl.* Com., 349, declared by the Colonial Governments, 1 Kent, 608; and by the 1st Continental Congress, 1 Kent, 612, (9 Ed.;) asserted in the Constitution of the United States: Art. 3, s. 2; Amendments Art. 6; Story on the Const., § 1779, 1791; preserved in the Constitution of Tennessee, Art. 1, ss. 6, 8, 9; and the Bill of Rights preserved by special guaranties and restrictions, Art. 9, s. 16. Legislature the creature of the Constitution: *Bristoe* v. *Evans*, 2 Tenn., 341. The Constitution reserves the very power that the Legislature have attempted to exercise in the provision objected to. If the Legislature may dispense with this proof, they may with any other, and so deprive the party of any effective right of review in this court.

On the construction of Constitutions, he cited *Work* v. *State*, 2 Ohio, St. R., 296; 1 How. Miss., 177; 10 Yer., 59; 5 Hum., 165.

The right of trial in the county where the offense is committed, is too sacred to be intermeddled with: *Dula* v. *State*, 8 Yer., 511; 1 Cold., 338.

If the court regard the statute as merely raising a presumption that the venue was proven, the presumption is met by the direct averment in the bill of exceptions that it contains all the evidence.

Attorney General HEISKELL, for the State, relied on the same matters more fully set out in his petition to re-hear. *Post*, p. 434.

Duncan Mayes *v.* The State.

TURNEY, J., delivered the opinion of the Court.

In prosecutions by indictment or presentment, the accused hath a right to a speedy public trial by an impartial jury of the county in which the crime shall have been committed: Cons., Art. 1, Sec. 9.

After treating of the statement of venue in the margin of an indictment, Mr. Chitty, in vol. 1, page 194, of his work on Criminal Law, proceeds: "In the body of the indictment, also, the facts should in general, be stated to have arisen in the county in which the indictment is preferred, so that it may appear the offense was within the jurisdiction of the court."

It is well established at common law, that, if the indictment or presentment fail to lay venue at all, or fail to lay it in the county in which it is proposed to try the accused, it will be bad, and, on motion, quashed; or, after trial and conviction, the judgment will be arrested. In the bill of exceptions before us, there is no proof positive nor circumstantial, of venue, and it is concluded: "This was all the evidence."

It is insisted, we must presume the court of original jurisdiction did all things rightly until the contrary appear affirmatively. Trying this proposition by the inflexible constitutional rule, that the venue must be proved or the accused acquitted, we would, in a universal adoption of the premises, have the strange anomaly in the organization of our courts, that, as to this our first and vital ingredient in the offense necessary and indispensable to the original jurisdiction, the inferior court would have the exclusive jurisdiction of determining, first, the necessity, and next, the fact of proof of venue; and this court,

created as an appellate court, with no jurisdiction except revisory, and having imposed upon it the duty of reviewing the action or non-action of inferior courts, not in a limited capacity, but generally, and embracing all things done and not done pertinent to the issue, especially in criminal proceedings, conjecturing in the absence of all proof positive or circumstantial, that the accused had had dealt to him every right of impartial trial in the mode and place made certain to him by the Constitution.

Recognizing such to be the law, and admitting, as we must, that venue may be proved by circumstances as well as direct proof, a case might arise in which the facts relied upon as evidence of venue would in fact, be insufficient or reasonably doubtful, still, a jury having convicted, and the record showing all the facts adduced, it would be the duty of this court, acknowledging as its rule of government, the statute, that it should not grant a new trial, "because the bill of exceptions fails to state that the venue was proven in the court below," to hold that in its revision it can not look to or consider the sparseness of proof touching that single question, but must supply by presumption, the real lack of *quantum* in necessary testimony, and take for granted, notwithstanding its sworn obligation, that full proof was made but omitted, (left out, dropt from, not inserted,) in the bill of exceptions. Such doctrine constitutes this court the power to supply the bill of exceptions in the one particular as to secure punishment, when in all likelihood the facts themselves have failed.

Duncan Mayes *v.* The State.

We are too far advanced in the decline of constitutional rights to fritter away the remnant.

The 9th subdivision of Sec. 5242, of the Code, is void. Reverse the judgment.

The Attorney-General presented the following petition to rehear this cause:

The Attorney-General for the State of Tennessee, respectfully asks the Court to reconsider the question involved in this cause. He is induced to make this application by the consideration that the point involved is one of constitutional law, affecting the legislative power of the State, and extending the restrictions of the constitution over that department of the state government, to an extent fraught with the gravest consequences. He is compelled by his views of constitutional law, derived from the unvarying doctrines of the adjudged cases, to regard the declaration that an unwarrantable exercise of power has been assumed by the Legislature, as an act of the greatest delicacy, and one only to be resorted to in extreme cases. To hold that the Legislature of the State is powerless to cure defects in criminal procedure, in any case, is a matter of such vital consequence, that he feels that it would be dereliction of duty to cease from efforts to avert such a decision, while any resource remains, known to the practice of the Court. He, therefore, respectfully asks the Court to consider the following positions:

He admits fully that the Constitution guarantees the right to a defendant to be tried in the county where the

offense has been committed, but he respectfully submits that the constitutional *privilege* of *being so tried*, is a thing wholly distinct and independent of the preservation in any form, of the *evidence that he has been so tried.*

In ninety-nine cases in a hundred, the party is tried and there is no evidence preserved at all. In all these cases, if they are brought into the Supreme Court, there being no evidence at all, the court presumes that the party has had his constitutional privilege of being tried in the proper county.

If the privilege can be presumed to have been allowed in these cases without proof, then the principle is established that the preservation of the proof is not a part of the constitutional privilege. It may be said that the allegation is always there, and that the finding is conclusive on this question. But the allegation is dispensed with, and this has been held by this Court to be constitutional, in *The State* v. *Quartemus*, 3 Heis., 65. And it was held by the former bench to be valid in *The State* v. *Shull*, 3 Head, 42.[1] So that in many cases it may, without any constitutional interposition, be the case, that a man is punished in the proper county in a valid proceeding, in which it does not appear by *any allegation*, or *proof*, that the offense was committed in the county where it was tried. On what principle? That the Legislature had the power not to take away the privilege, but to regulate the code of criminal procedure, that they have the right to dispense with the allegation of venue, and so to frame criminal pleadings and entries, that in the absence of any thing

[1]See also *Andy Williams* v. *State*, *ante* 37, and *Timms* v. *State*, 4 Col., 138.

in the record to show that this right has been infringed, it shall be presumed that the right has been respected.

He respectfully submits, that this is not an exceptional rule, or any hardship on a party. *No person shall for the same offense, be put twice in jeopardy of life or limb.* What guaranty has this court, that a party has not been twice in jeopardy? Simply that he does not plead it. It is as high a constitutional privilege as the other, but it is matter of special plea, presumed conclusively in the absence of such plea, not to exist. This establishes presumption against constitutional rights; that is, the State is not bound to negative in the record or bill of exceptions, the existence of a constitutional objection. If then *this* constitutional right must be set up by plea, would it not be competent for the Legislature, by statute, to declare that a defect of local jurisdiction should be set up by special plea, and should not be in issue on a plea of *not guilty.* It would then be placed on the exact footing on which stands the plea of *auterfois convict* or *acquit,* a correlative constitutional right. If the Legislature could regulate the plea, they could regulate the proof, and throw the burden of proof on the defendant. If they can throw the burden of proof on him, they can throw on him the burden of negativing the existence of the proof by an express averment in the bill of exceptions that it was not proved.

Permit me to return for a moment to the distinction between a *right* and the *proof* of the *exercise* of that right. That is broad enough. So is the *exercise* of the *right* distinct from the *proof* of the *exercise* of it. We exercise the right of voting, but who cares for the preservation

of the proof that he has voted. Many facts exist of which we have no knowledge; many others we know, of which we have no permanent proofs. Lands descend by the death of an ancestor to the heir. The descent is a fact. The proof may not exist in tangible form. The heir may enter by a perfect right, and hold by a perfect right, and yet if called on for proof, might be without any evidence of his right. His *right* and his *proof* of right are not the same thing. So a party may have a deed and a title. But the loss of his deed leaves his title unaffected—still vested in him as before. The title is one thing—the proof, the muniment, another. The *right* to be tried in the proper county is one thing; the *making* of the *proof* is another; its *preservation* still another.

I maintain that the prisoner may have the right, and may obtain the benefit of the right, of being tried in his own county, and that there may still be no proof existing on any record that he has been tried in the proper county. Yet the fact exists. If the fact *exists*, he has had his *constitutional privilege.* If the fact was *not* so, and there were the fullest record evidence to show that it did exist, (false in fact,) then he would not have had the *constitutional privilege*, notwithstanding the proof.

It is the *fact* which the *Constitution* guaranties. The *evidence*, the mode of *allegation and proof*, is left to the Legislature. Another clause, not this, puts some restriction on the power of the Legislature as to indictments; but that affects the notice of the crime. The Constitution no where meddles with the evidence in criminal cases, except to require strong evidence to refuse bail, and to give compulsory process for witnesses, and to

give the right to meet the witnesses face to face. The Legislature is trusted in all other respects.

And here we may say, further, that a fact may exist, and the evidence may exist, and never be called out. It may be called out, and not be recorded. It may be recorded and lost, and so be non-existent. The Legislature takes cognizance of these possibilities. It *requires* that the *fact* of *trial* in the *proper county* shall exist. It requires the *existence* of the proof for it requires, by express law, the production of the proof on the trial: Code, 5125. But there it stops. There it has fulfilled the Constitution. Now it says, "after all this, if there is a failure to put this proof of record, the presumption shall supply that deficiency in recording the proof, not the failure to make it. We know that in many cases that proof is made, when by inadvertence the statement is omitted; we know that by trickery and fraud, it is often left out; we know that the prisoner, when it is not proved, can easily put it down by express averment; and we therefore do not infringe his right to trial in the proper county, when we say that the general allegation in a bill of exceptions, that this was all the evidence, shall not be construed to exclude the conclusion that there was evidence of venue; but there shall also be the specific allegation added, "and there was no other proof of venue," so as to show that the proof on that subject was a matter to which special attention was called, and not a thing omitted by mere oversight." Such an act comes within that wise announcement of Lord Denman, as to the reform of criminal proceedings, "than which nothing is more worthy the attention of a civilized state."

On the other hand, to hold that this clause is void, is not to guard the real rights of the defendant; but it is to make fraud on courts, and the benefit of mistake and inadvertence, constitutional privileges too sacred for the Legislature of the State to abolish or take away. This is not a cause in which that conservative principle, that the Court will hesitate to declare the act of the Legislature void, ought to be departed from, if there is any case in which it should be. On the other hand, this is an effort of the Legislature to encourage the honest administration of the criminal law, by doing away with the temptation to one of the most frequent frauds on the law. I earnestly ask the Court to give these views their full weight, and to regard the importance of the question, not as affecting this prisoner, not as affecting this amendment alone, but as affecting the principles of constitutional law, laying down a new canon of construction, and restricting the right of the Legislature to pass statutes of amendment in criminal cases.

TURNEY, J., delivered the opinion of the Court.

The opinion delivered on a former day does not hold "that the Legislature is powerless to cure defects in criminal procedure in any case," but does hold that the Legislature, in its efforts to cure defects, must confine itself to the powers given it by the Constitution; and if it shall transcend such power, its acts are void. The Constitution is the supreme law; the Legislature is its creature; that the creature shall be greater than, or even equal to its creator, is a legal as well as a natural impossibility.

It is the fact that the offense has been committed in a county that gives the court of that county jurisdiction to try the accused. The fact is an ingredient absolutely necessary to conviction, and must (not merely may) be made to appear.

Take the provision of the Code, making it unnecessary to lay venue in the indictment, and the provision involved here, put them together, and bring to this Court a case only made out by their application, and we have a proceeding as nearly void of form and substance as it is reasonably convenient to imagine.

The instance put, that, "in ninety-nine cases in a hundred, the party is tried, and there is no evidence preserved at all, and if these cases are brought to this Court, the Court presumes the party has had his constitutional privilege of being tried in the proper county," does not support the view insisted upon by the Attorney General; because it is the duty of the party appealing to tender his bill of exceptions; and if he fail to do so, he thereby conclusively admits that in the matter usually constituting the bill of exceptions there is no error, and that he relies upon error in the matter of record or in the charge of the Court.

If, on the other hand, a bill of exceptions perfect in form is tendered and accepted by the State and the Court, turns out to be substantially defective, we must presume the Court to have done all it undertook to do; that is, made a full and complete bill of exceptions; the undertaking of the parties and the Court excludes all reason for intendment, committing them to the perfectness of their effort to present to this Court a full and

true account of the evidence upon which the action of the inferior court was based.

The tender of a bill of exceptions is notice to the State and Attorney General that in it are supposed errors, for which the Court will be asked to reverse.

Being so advised, it is the duty of the State, through its Attorney General, to see that every essential element for its interest is communicated to this Court through the bill of exceptions.

The attempted parallel between the question in hand and the rule, that the accused, to be able to avail himself of a former acquittal or conviction, must plead it specially, fails. These defenses are not to the merits, do not involve the question of guilt, but simply matters of record, by resort to which the accused passes by, a plea to the merits onerating the State with the burden of affirmative proof, and takes upon himself the obligation of showing affirmatively matter in bar of the prosecution; and if his plea fails, he returns to the legal presumption of his innocence, as though he had never attempted matter in bar.

The presumption, that no such special defenses exist, is the inevitable offspring of the legal presumption that every man is innocent until the contrary appears by the proof. It is not in the power of the Legislature to so regulate the proof as to throw the burden on the defendant.

It would be extremely absurd to have a rule by which every unprincipled vagabond could prefer his charges, and then rest, the accused being required to show, negatively, his innocence, or else suffer the severest

penalty. The broad statement of the proposition is sufficient to repel it.

We can not consider the proposition, "that by fraud and trickery the proof of venue may be left out of the bill of exceptions." If we supply essential want in one thing, by such presumption, we may in all things. We are only authorized to try a cause as the record presents it; and if Attorneys General and courts are the victims of "fraud and trick," it is the misfortune of communities, and not the fault of revising courts. The remedy is in the hands of communities, and not within the province of an appellate jurisdiction.

Judicial construction of constitutions has gone to the verge of liberality. To it mainly attaches the sad responsibility of our struggle, in its evening twilight, to preserve the fragments of organic security. *Stare decisis.*

LEROY LOGAN *v.* THE STATE.

STATUTE. *Passed when signed.* The time at which an act of Assembly takes effect, forty days after its passage, is ascertained by computing from the date of its signature by the Governor, or its final passage over his veto.

FROM MARSHALL.

Circuit Court, February Term, 1871. W. P. MARTIN, J.

W. H. WISENER and J. H. LEWIS, insisted that

the act took effect forty days from the Governor's signature.

Attorney General HEISKELL, for the State.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff in error was presented by the grand jury, at October Term, 1870, of the Circuit Court of Marshall county, for unlawfully carrying a pistol, under the act, approved June 16th, 1870.

The presentment charges, and the proof shows, that the alleged offense was committed 22d July, 1870.

The Statute, under which the presentment was made, was passed by both houses of the General Assembly, June 11th, 1870, and was approved by the Governor, 16th June, 1870, and provides that it shall "take effect forty days from and after its passage."

Counting from the 11th of June, the forty days had expired; but counting from the 16th June, the forty days had not expired on 22d July. The Circuit Judge held that the act took effect forty days after 11th June, 1870, the time when it passed both branches of the Legislature, and the jury returned a verdict of guilty against the defendant.

Motion for new trial and in arrest of judgment having been made, and overruled by the Court, the defendant appealed, in error, to this Court.

The Constitution of 1834, Art. 2, s. 18, provided, that no bill shall become a law, until it shall be read and passed on three different days, in each house, and be signed by the respective Speakers.

Being so read, passed and signed by the Speakers, it became a law; it not being required, under that Constitution, that the Governor should approve or sign it. Art. 2, § 18, of the Constitution of 1870, contains the same provisions; with the addition, that "the bill shall not become a law, unless it shall have received, on its final passage, in each house, the assent of a majority of all the members to which that house is entitled, and shall have been signed, in open session, by the respective Speakers, and shall have been approved by the Governor, or shall have been otherwise *passed* under the provisions of this Constitution." It will be observed, that this clause of the Constitution does not treat the bill as *passed*, without the approval of the Governor, although signed by the Speakers, unless by one of the two other modes by which it may become a law without his approval. One of these modes is, to pass it by a majority of all the members of each house, notwithstanding his objections, the other, by the failure of the Governor to return the bill, with his objections, within five days after it shall have been presented to him.

By the Constitution of 1870, the approval of the Governor is just as essential to the validity of a legislative enactment as a law, (except in the two cases above stated,) as the passage of it by both houses and signature of the Speaker of each, and it can not with propriety be said to have passed, or been enacted into a law until it has received all the constitutional sanctions required to give it effect as such.

The Governor's qualified veto power, and the necessity of his approval of the acts of the Legislature,

in order to their validity as laws, have been held to constitute him a component part of the Legislature; such power being legislative rather than executive: Cooley Con. Lim., 153–155.

By Sec. 20, of Art. 2, it is declared that, "no *law* of a general nature shall take effect until forty days after its passage, unless," &c.

The meaning of this section is, that the law shall not take effect until forty days after it has become a law; that is, after it shall have received the approval of the Governor; or upon his refusal to approve, shall have been otherwise passed under the provisions of the Constitution.

The Circuit Judge held otherwise, and we are of opinion that in so holding, he erred.

Let the judgment be arrested, and defendant discharged.

J. R. Jones *v.* The State.

1. Indictment. *Assault to Ravish. Feloniously.* In an indictment for an assault with intent to ravish, it is not necessary to charge that the assault was feloniously made.

2. Verdict. *Effect of, in Supreme Court.* Where the questions involved

in a trial below are mainly dependent on the credit of witnesses, much weight is to be given in the revising court to the action of the court and jury.

Case overruled: *Nevills* v. *The State*, 7 Cold., 78.

Case cited: *Williams* v. *The State*, 8 Hum., 585.

FROM DE KALB.

Circuit Court, July Term, 1871, S. M. FITE, J.

E. L. GARDENHIRE and M. M. BRIEN, for the prisoner, insisted that the indictment must charge the *assault* to be *felonious:* citing Act of 1829, c. 23, s. 53; Code, 4615; *Williams* v. *State*, 8 Hum., 585; *Nevills* v. *State*, 7 Cold., 78; 2 Grant, (Pa.,) 385; Wharton's Pr., 255; Felony defined, 4 Bl. Com., 94; *Ballew* v. *Alexander*, 6 Hum., 434. Admitted that the first section of the Act of 1829 was omitted from Code.

On the evidence of rape, cited: *Phillips* v. *State*, 9 Hum., 246; East's P. C., 443; 4 Bl., 214 n., 215; 1 Russ on Cr., 691; Roscoe Cr. Ev., 862; *Major* v. *State*, 2 Sneed, 11; 4 Sneed, 597.

On the charge they cited: *Phipps* v. *State*, 3 Cold., 348.

Attorney General HEISKELL for the State, on the sufficiency of the indictment, cited: *Dillard* v. *State, ante* 260; *Riddle* v. *State, ante*, 401; *Williams* v. *State, ante*, 39; *J. C. Williams* v. *State, ante*, 376.

On the presumption in favor of proceedings below: *Stanley* v. *Crippen*, 1 Head, 116; *Cornelius* v. *Merritt*, 2 Head, 99, 100; *Nolen* v. *Wilson*, 5 Sneed, 340; *Large* v. *Dennis*, Ib., 597; *State* v. *Harder*, 2 Dev. & Bat., 407; *Thomas* v. *Alexander*, Ib., 385; *Pickett* v. *Pickett*, 3 Dev., 6;

Turner v. *State*, 9 Hum., 119, 120; *Isham* v. *State*, 1 Sneed, 114; *Bedford* v. *State*, 2 Swan, 73; *Betts* v. *Demumbrune*, Cooke, 39, 48; *McGavock* v. *Ward*, Ib., 403, 405, 406; *Kelton* v. *Bevins*, Ib., 102; *Gregory* v. *Allen*, M. & Y., 74, 77; *White* v. *Hembree*, 1 Tenn., 529; *Cassel* v. *Franklin*, 2 Tenn., 201; *Mitchell* v. *State*, 5 Yer., 346; *Wartrace* v. *W. & B. G. T. Co.*, 2 Col., 519; *McBee* v. *Petty*, 3 Col., 178; *Williams* v. *State*, *ante*, 379; Meigs' Digest, § 602; *Harris* v. *State*, per Nelson, J., Nashville, 1871.

The presumption is the same in civil and criminal cases: *McClure* v. *State*, 1 Yer., 217; *Ewell* v. *State*, 6 Yer., 374; *Gillespie* v. *State*, 8 Yer., 508. And see *Turner* v. *State*, *post*, 452.

NICHOLSON, C. J., delivered the opinion of the Court.

James R. Jones was indicted for committing an assault and battery on Roxana Bailiff, in DeKalb county, on the 16th of October, 1861, and convicted. From the judgment sentencing him to the Penitentiary for five years, he has appealed to this Court.

The first ground on which a renewal is sought is, that the Circuit Judge erred in refusing to arrest the judgment for a fatal defect in the indictment. The charge in the indictment is as follows:

"That James R. Jones, on the 16th of October, 1866, in the county of DeKalb, and State of Tennessee, in and upon Roxana Bailiff, then and there being, did make an assault; and her, the said Roxana Bailiff, then and there did beat, wound and ill treat with intent, her the said Roxana Bailiff, violently and against her will then and

there feloniously to ravish and carnally know, and other wrongs," &c.

The objection to this indictment is, that it does not charge that the assault and battery were committed with the *felonious* intent, but that the felonious intent charged is to ravish. This objection is sustained by the cases of *Williams* v. *The State*, 8 Hum., 585, and *Nevills* v. *The State*, 7 Cold., 78. In the former case, Judge Green said: "The indictment should have charged, that the prisoner 'feloniously did make an assault;' using the word feloniously in relation to the assault; and to charge that the party made the assault with intent feloniously to ravish, is to charge a misdemeanor only, with the aggravating circumstance of the intent to commit a felony." In the case in 7 Cold., Judge Gaut, special judge, followed the holding by Judge Green.

The section of the Code on which the defendant was indicted, is as follows:

"Sec. 4615. Any person guilty of committing an assault and battery upon any female, with an intent, forcibly and against her will, to have unlawful carnal knowledge of her, shall, on conviction, be imprisoned in the penitentiary not less than two nor more than ten years."

This section was brought into the Code from the 53d section of the Penitentiary Code, passed in 1829, and in the same language. It is observed that, in the description of the offense, the word "felonious" is not used, nor is it used in the 53d section of the Act of 1829, which was in force when Judge Green gave his opinion in the case of *Williams* v. *The State*, 8 Hum., 585. But he held

that in describing the offense in the indictment, the assault should be charged to be "felonious," because, by the 1st section of the Act of 1829, all the offenses enumerated in that act were declared felonies, and punishable in the penitentiary. The offense described in the 53d section being in this way shown to be a felony, he held that the indictment was bad, because the assault was not charged to be felonious.

But when the Code was adopted, the 1st section of the Act of 1829 was left out, and we now have no statute defining what offenses are felonies. The offense of assault and battery on a female, with intent to ravish, described in section 4615, is not in that section, or in any other in the Code, declared to be a felony; but it is declared to be punishable in the penitentiary. It follows, that since the adoption of the Code, it is not necessary in charging the offense of assault and battery with intent to ravish, to charge the assault and battery to have been felonious.

As described in the Code, it is immaterial whether the offense be regarded as a felony or a misdemeanor, it is punishable by imprisonment in the penitentiary. And an indictment charging the offense in the language of the Code, or in language of equivalent import, is sufficient. We have held in two cases at the present term, that indictments charging murder in the first degree were good, although the crime was not charged to have been "feloniously" committed; for the reason, that, in describing the crime of murder in the first degree in the Code, the word "felonious" is not used; and that it was sufficient to charge the crime in the words of the Code. In like manner, and for a like reason, we hold, in the present

case, that the indictment is good, although the assault and battery is not charged to have been felonious. It follows that we overrule the case of *Nevills* v. *The State*, 7 Cold., 78, and hold that the Circuit Judge committed no error in overruling the motion in arrest of judgment.

The next ground relied on for a reversal, is, that the verdict is not sustained by the evidence. The verdict rests mainly on the evidence of the prosecutrix, who is the step-daughter of the defendant. The chief witness assailing her credibility was a son of defendant by a former marriage. If the evidence of the prosecutrix was true, the defendant is guilty; but if the evidence of the defendant's son was true, the prosecutrix was, from her very childhood, a confirmed strumpet, and her evidence false and insufficient to sustain the verdict. The defendant's son represents, in his testimony, that, from the age of five years until she was sixteen, (her age when the present offense was committed,) she had been in the constant habit of having sexual intercourse with the witness, he being three years older than the prosecutrix. On the other hand, she emphatically and positively contradicts the entire evidence of defendant's son. Her character was sustained by witnesses—his was attacked by several, but sustained by more than those who attacked him.

There are circumstances connected with her account of the assault, upon her, calculated to excite suspicion as to the reliability of some of the details, and to raise some doubt as to the intent with which the defendant made the attempt upon her virtue; there are other circumstances calculated to sustain and corroborate her story.

J. R. Jones *v.* The State.

Upon the whole, we are brought to the conclusion that it is one of the cases in which we are bound to concede much weight to the action of the jury and the court below. It was mainly a question as to the credit to be given to conflicting witnesses. The jury and the court had full opportunity to make up a much more satisfactory judgment as to the credit to be given to the witnesses than we can have, nor do we see in the record any reason to infer that there was anything like passion or rashness on the part of the jury. The defendant had left the county soon after the occurrence, and had been absent three or four years. In the meantime, the prosecutrix had married. We can not see that there existed, after such a lapse of time, any such public excitement as interfered with an impartial trial. Under all the circumstances, we are constrained to conclude that the verdict and judgment below ought not to be disturbed.

Several exceptions have been taken to the charge of the Circuit Judge, but after carefully weighing and scrutinizing them, we are satisfied that they are not well taken.

Let the judgment be affirmed.

GREEN TURNER *v.* THE STATE.

1. HORSE STEALING. *Verdict. When capital.* Under the Act of 17th May, 1865, c. 5, s. 1, horse stealing is capital, in all cases where the jury do not commute the punishment; and a simple verdict of guilty is sufficient for the infliction of the death penalty.
2. CHARGE. *Reference to Statute.* If the Bill of Exceptions show that the judge read "the Act on which the indictment was founded," without further description, it is sufficient without setting it out in words.
3. INDICTMENT. *Description. Color and sex.* If the indictment describe the animal stolen, by color and sex, the color and sex must be proved as laid, but such description is unnecessary.
4. SAME. *Color. Proof of.* Where the indictment described the animal as a bay, proof that the animal was a bay or red sorrel was held sufficient to support the verdict.
5. ERROR. *Must appear.* To obtain a reversal in a court of errors, error must be affirmatively shown.

Case cited: *Kirby* v. *State*, 7 Yer., 259.

FROM GILES.

Circuit Court, August Term, 1871. WM. P. MARTIN, J., presiding.

THOS. M. JONES, for the prisoner.

Attorney General HEISKELL, for the State.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff in error was convicted at the July Term, 1871, of the Circuit Court of Giles county, of stealing a mule.

Motions for a new trial and in arrest of judgment were severally made and overruled; and the court pro-

ceeded to pronounce the judgment of death upon the defendant, from which he has appealed in error to this court.

The indictment charges that Green Turner, on the 5th day of September, 1870, in the county of Giles, aforesaid, feloniously did steal, take, and carry away, one bay mare mule, of the value, &c.

For the plaintiff in error, it is insisted that the judgment should be reversed, because the jury in their verdict did not find what punishment the defendant below should undergo, for the offense of which they convicted him; and the case of *Kirby* v. *The State*, 7 Yer., 259, is cited, as sustaining this proposition.

There is no analogy between that case and this; and the reasons that required in that case that the jury should find more than a simple verdict of guilty as charged in the indictment do not exist in this. That was an indictment for murder, which, under our statutes, consists of two degrees, murder in the first degree, and murder in the second degree, and the punishment in the one case is different from the punishment in the other, and it is made by statute the duty of the jury to ascertain in their verdict whether the offense charged is murder in the first or second degree.

By the Act of 17th May, 1865, it is provided "that whoever shall feloniously take or steal any horse, mule, or ass, shall, on conviction thereof, suffer death by hanging: *Provided*, the jury before whom the offense is tried shall, if they think proper, commute the punishment to imprisonment in the penitentiary for a

period of not less than ten, nor more than twenty-one years."

The law annexes the punishment of death by hanging to the offense of stealing a horse, mule or ass, but the jury may, if they think proper, commute the punishment. If in their verdict they do not exercise their discretion in the commutation of the punishment, it of course stands as prescribed by the Act, a conviction of an offense punishable with death, to be enforced by the judgment of the court.

There was, therefore, no error in the verdict of the jury, or judgment of the court, for the reason assigned in the exception just considered.

The jury manifestly, purposely abstained from the commutation of the punishment provided by the statute, as they were instructed in the charge of the judge that they had the right to commute the punishment as provided in the statute, which he read to them; and he further told them that if they found the prisoner guilty, as charged in the indictment, without saying more, the legal effect of their verdict was, that the defendant would be hung.

Another objection is taken to the proceedings in the court below, that the court in his charge read the statute upon which the indictment was founded, the record reciting the fact that he read it, and showing by reference to the power of the jury to commute the punishment, and the legal effect of the simple finding of guilty as charged, &c. What statute was read? We do not think there was such error in this to authorize a reversal. No error is affirmatively shown, and it is well settled by

numerous adjudications, that this court will not reverse, unless it is shown affirmatively that error has been committed. While we can not reverse for this alleged error, we are of opinion that the rule referred to, which restrains us from reversing, ought not to be construed as authorizing a partial omission, or imperfect statement, of the history of the trial below, but that the record should exhibit as fully and clearly as practicable, what was in fact done, in the court below; and when a statute or other law is read to the jury, it should be so specified by quotation or otherwise as to preclude mistake in this court, as to what was so read to the jury.

The indictment charges the defendant with stealing "one bay mare mule," and defendant insists that the proof shows it was a "red sorrel mule."

The testimony of two witnesses, one being the owner, describes the mule as a "bay," while one of the two says some people would call it sorrel, but he considered it a "bay." Three other witnesses describe it as a "red sorrel."

The court told the jury that "the indictment alleges the mule to be a bay, and it must be proven to be the color stated," "and if the proof shows the mule to be a sorrel, it is a fatal variance." The jury found from the proof it was a bay, and we can not say they were in error in so finding. There was evidence to support the verdict, and from the testimony of one of the witnesses, the difference between a bay and sorrel is so shadowy that it can hardly be said to be incorrect to call it the one color or the other.

It is not like the marked and well defined difference between white and black.

But the mule is described in the indictment not only as a "bay," but as a "bay mare mule."

Under the Act of May 17th, 1865, it would have been sufficient to have described the subject of the larceny simply as a "mule." Then the color and sex would have been wholly immaterial, if the identity had been otherwise established.

But the terms "bay mare" having been used as descriptive of the mule, although unnecessarily so used, they become material averments and must be proved. Where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved, for they all are made essential to the identity. Thus in an indictment for stealing a *black* horse, the animal is necessarily mentioned, but the color need not be stated, yet if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal: 1 Gr. on Ev., § 65, citing 1 Stark. Ev., 374, Rosc. Cr. Ev., 102-3; 2 Rus. on Crimes, 788.

In a case cited, Rosc. Cr. Ev., 103, the prisoner was indicted for killing a mare, the proof showed it was a colt without specifying the sex, and it was held not sufficient to support the charge of killing a mare. No allegation in an indictment, whether necessary or unnecessary, which is descriptive of the identity of that which is legally essential to the charge in the indictment,

can be rejected as surplusage, but must be proved as laid.

There is no testimony in the record to support the averment of the indictment that the mule stolen was a mare mule; on the contrary, there is testimony tending to show that it was a horse.

The prosecutor, who was owner of the mule, upon his examination, whenever he used any language indicating the sex of the mule, employed the masculine pronoun "him," which he did frequently in the progress of his examination as a witness. Other witnesses used the same term, and none use any term or make any reference to the mule which would indicate that it was a mare. So far, then, as there is any testimony upon this point, its tendency is not to sustain, but to disprove the averment in the indictment that the animal was a mare mule.

For this reason, we reverse the judgment and remand the cause.

Sol. Stone *v.* The State.

1. Killing a Horse. *Malice at special owner.* Killing a horse, with malice at the bailee of the animal, constitutes the offense described in the Code, 4657, though there be no malice at the general owner.
2. Indictment. *Averment of malice.* The fact that the animal is described

as the property of the general owner, does not restrict the proof of malice, to malice against him, but will admit the proof that the malice was at the special owner.

FROM LINCOLN.

Circuit Court, July Term, 1871. W. P. HICKERSON, J.

NEWMAN & ALLEN cited Code, 4657, and Whart. Am. Cr. Law, title, Malicious Mischief.

Attorney-General HEISKELL for the State, cited and commented on the *State* v. *Wilcox*, 3 Yer., 278, insisting that the original construction of the Act of 1803 was strained, as it made the act criminal if done either maliciously or *of purpose.* That case was upon a special verdict, finding malice at the animal, and none at the owner; and so could not involve the question of malice against a temporary owner. Insisted, that if a man were to kill animals of whom the owners were unknown, from general malevolence, it would constitute the offense, citing: *Rex* v. *Philp*, 2 Russ. on Cr., 545, and n. c, 2 Archb., 782, 783.

Cited *State* v. *Taylor*, 6 Hum., 285, and 2 Archb., 781, to show that the indictment was good, without any charge showing against whom the malice was, and insisted that the averment of ownership had no necessary connection with that of malice, the ownership being truly alleged.

NICHOLSON, C. J., delivered the opinion of the Court.

Sol. Stone was indicted in the Circuit Court of Lincoln county, for maliciously killing a horse, the property of

Thornton Russell, of the value of $150. Russell loaned the horse to John Kelso to ride to the house of Sol. Stone. Upon reaching there, he hitched the horse to the fence, near where Sol. Stone was rolling logs. Kelso informed Stone that he had come for his clothes, which were at Stone's house, near by. They got into angry words, when Kelso started towards the house, threatening to get his gun, which was at Stone's house. Thereupon, Stone struck the horse three blows with a handspike, over the head, which broke his skull and instantly killed him. Stone had no malice against Russell, the general owner of the horse, but he was mad with Kelso, who was in possession of him, and the temporary owner.

The Circuit Judge charged the jury that "if you should believe from the evidence that Thornton Russell was the owner of the horse killed, but at the time of the killing Kelso had the horse in his possession, under a loan or hire from the general owner Russell, and in consequence of defendant's malice against him, Kelso, defendant maliciously and wilfully killed the horse, then the court is of opinion that defendant would be guilty, although Kelso only had a special property in the horse, accompanied with possession."

The jury found the defendant guilty, and sentenced him to one year in the penitentiary.

It is insisted here, that the law was erroneously charged to the jury. It is well settled, that to constitute the offense of malicious mischief in the killing of a horse, the malice must be towards the owner. It is necessary that the indictment should charge that the horse was maliciously killed, and also state who the owner of the pro-

perty was. But it is not necessary that it should be charged that the killing was with malice towards the owner. The owner should be named, by way of identifying the horse, and because upon conviction the defendant would be liable to judgment for the value of the horse.

The charge of the court was, that proof of malice towards Kelso, the special owner, was sufficient, although the indictment charged that Russell was the general owner. As it was not necessary to charge in the indictment that the killing was with malice towards Russell, the general owner, it was sufficient to prove that it was done with malice towards the special owner.

There was no error, and the judgment is affirmed.

LEWIS TAYLOR *v.* THE STATE.

1. INDICTMENT. *Larceny. Allegation of value. General.* On an indictment for larceny, a charge of stealing two hams, two shoulders and eight jowls, weighing one hundred pounds, of the value of fifteen dollars, was held sufficient, the verdict being general.
2. LARCENY. *General verdict.* A general verdict, in larceny, on an indictment charging the stealing of articles of more than ten dollars in value, is a verdict of grand larceny.
3. VERDICT. *Several counts.* A general verdict on an indictment containing several counts, will be referred to the count which will sustain the conviction.
4. CHARGE OF COURT. *On questions not pertinent to proofs.* Where the charge is grand larceny, and there is no proof of a larceny of less than

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$10, but the whole proof relates to a larger value, it is not necessary for the court below to charge upon the discretionary power of the jury to fix a punishment in the county jail.

Case approved: *Isham* v. *State*, 1 Sneed, 114.

Cases cited: *Wyatt* v. *State*, 2 Swan, 396; *Williams* v. *State, ante*, 376.

FROM GILES.

Circuit Court, August Term, 1871. WM. P. MARTIN, J.

JAS. M. QUARLES, for the prisoner, cited *Hope* v. *Com'l*, 9 Metc., 134; *State* v. *Williams*, 10 Hum., 101; *Baldwin* v. *State*, 1 Sneed, 411; 2 Arch. Cr. Pl., 356, n.

Attorney General HEISKELL, for the State, cited, on effect of verdict and judgment below, same authorities cited in *Jones* v. *State, ante*, 446; allegation of value of property stolen, and verdict, *State* v. *Hood*, 51 Maine. Insisted that in this State, where the jury fix the punishment, there is no need for the value to be specially affixed to each article. The punishment of grand and petit larceny is the same, except the term of imprisonment, and as to that, it may be the same for any period between three and five years. A verdict of less than three years' confinement is necessarily petit larceny, and over five years is necessarily grand larceny. Where it is between three and five years, it may be either; but as the jury ascertain the only doubtful point dependent on the distinction, *i. e.*, the punishment, and the Court has every element on which to enter the judgment, a general verdict is good. If the Court had to fix the punishment within limits depending on the grade of the offense, it would be otherwise.

He also cited *Wattingham* v. *State*, 5 Sneed, 64, to show that a verdict for a less time than the law allowed, was an error of which the defendant could not avail himself, as not being error against the defendant; and so, an error which did not injure him, because it was immaterial, could not avail him.

FREEMAN, J., delivered the opinion of the Court.

This is a conviction for larceny in the Circuit Court of Giles county, and the prisoner is sentenced to the Penitentiary for three years, from which he prosecutes an appeal in error to this Court. The first error assigned here is, that the indictment contains no sufficient description of the property stolen. It charges the prisoner with stealing two hams of bacon and two shoulders of bacon, and eight jowls, weighing one hundred pounds, of the value of fifteen dollars. It is insisted that each article taken must be specifically described, and the separate value of each charged. For this two cases are cited—*Baldwin* v. *State*, 1 Sneed, 411; *Williams* v. *State*, 10 Hum., 101. No such rule is laid down in these causes; in the first, the Court simply holding the description sufficient; in the other, that when a party was charged with stealing a horse, bridle, saddle, blanket and martingale, that it charged but one crime, it being the same act of larceny, the property being stolen from the same individual at the same time. The other case cited, of *Woodfolk Lewis*, at the present term of this Court, has no bearing on the question. The description of the property stolen in this case is certainly sufficient, being as definite as the nature of the articles stolen will permit.

The other objection has nothing in it; as to the failure of the Judge to charge the jury that, upon their recommendation, the Court might substitute fine and imprisonment in the county jail instead of confinement in the Penitentiary. The section of the Code applies to cases of petit larceny, not to cases of grand larceny, as this was charged to be, and as it is proven to have been, by the owner, he proving the meat to have been worth $20.

It is next objected, that the verdict is general; that "defendant is guilty in manner and form, as charged in the indictment," so that we can not tell on what count the verdict was rendered, there being two counts in the indictment—the first for larceny, the second for receiving stolen goods. This question has been decided in two cases in our State, the opinion of the Court being delivered in both cases by the same learned Judge, the cases holding the directly opposite rule, the one to the other. In *Wyatt* v. *The State*, 2 Swan, 396, four counts were in the same indictment. The jury found a general verdict of guilty. The Court say: "The jury make no reference in their verdict to the separate counts. We can not know, therefore, whether they would have found a verdict of guilty or not guilty, on the first count." If the prisoner had been convicted in that case, on the first count in the indictment, it would not, say the Court, have been material whether the charge on the other counts was correct or not. The Court then adds: "We can not, therefore, know but that the general conviction was on the second or third counts, and they go

on to reverse the case, on the charge of the Court as to law arising on these last counts.

In the case of *Isham* v. *State*, 1 Sneed, 115, it was objected to the conviction, that it was had on the second and fourth counts, and that the latter was bad. The Court laid down the rule to be: "If the verdict is general or upon two counts, and either count be good, the conviction will stand, no matter how defective the other may be." The two cases, however, may be distinguished in this, that in the first case, the Court had charged the law erroneously on the counts discussed by the Court in that opinion, and if the conviction had been under either of them, it was the result of the erroneous instruction; while in the other case, one count of the indictment on which the party was convicted was defective, the other being good. The Court, however, in the last case, must have referred the conviction to the good count, or else the judgment should have been arrested. In the case before us, we are compelled to refer the conviction to the count for grand larceny; for if it applies to the second count, for receiving the property, knowing it to have been stolen, the conviction could not stand, as there is no proof to sustain it. It was a case of simple larceny or nothing, from the proof. We can see clearly, from the proof, that the jury must have found the party guilty of the larceny, as no proof was introduced to sustain the other count; no attempt at seeking a conviction on it is made by the State. In a case like this, when we can see clearly that the party was tried under the proper count, and convicted under

it, and there is no error in the charge of the Court on any other count by which the jury might have been misled, we may well follow the rule given in the case in 1 Sneed, of *Isham* v. *The State*, and refer the conviction to the proper count in the indictment.

It is insisted that the testimony does not sustain the verdict of conviction. On this question we need but say that the evidence is somewhat contradictory, but not irreconcilable. If, as the jury evidently believed, the witnesses for the State testified truly, it is clear the prisoner is guilty. The jury have so found under proper instructions from the Court; and having the witnesses before them, with better means of testing their credibility than we can have, we are unable to say that they arrived at a wrong conclusion.

Let the judgment be affirmed.

The State *v.* Figures Smith.

DRUNKENNESS. *Indictable.* Since the adoption of the Code, a single act of public drunkenness is indictable.

Cases cited: *Smith* v. *State*, 1 Hum., 398; *Tipton* v. *State*, 2 Yerg., 543.
Statutes cited: 1842, c. 94; 1844, c. 98: 1859–60, c. 10.
Code cited: 41.

FROM WILSON.

Criminal Court, June Term, 1871. W. H. WILLIAMSON, J., presiding.

The State *v.* Figures Smith.

Attorney General HEISKELL, for the State, cited: *Smith* v. *State*, 1 Hum., 396; *Hutchinson* v. *State*, 5 Hum., 142; Act of 1844, c. 98, not carried into Code, and so repealed; 1859–60, c. 10. See, also, 1843, c. 141, s. 4.

AND. B. MARTIN, for defendant.

SNEED, J., delivered the opinion of the Court.

The State appeals in error from a judgment of the Circuit Court of Wilson county, quashing a presentment for drunkenness. The presentment is in form as follows: "The grand jurors for the State of Tennessee, good and lawful men, duly elected, impaneled, sworn and charged to enquire for the body of the county of Wilson aforesaid, upon their oath aforesaid, present that Figures Smith, on the 23d day of January, in the year of our Lord eighteen hundred and seventy-one, in the county of Wilson aforesaid, was unlawfully, willfully and infamously drunk in a public place, to-wit: in the town of Lebanon, in said county of Wilson, on the said 23d day of January, in the year of our Lord eighteen hundred and seventy-one, and on divers other times and places, to the evil example of divers good citizens then and there assembled, and against the peace and dignity of the State."

Prior to the act of 1842, c. 94, it had been uniformly held by this court, that a single act of public drunkenness from the use of intoxicating liquors, was an indictable offense at common law. Thus it was said by a learned Judge: "It is laid down in Blackstone, that sobriety in public is a duty that every man owes to the

community. It is, therefore, an offense to good morals for a man to be publicly drunk, and for this offense he may be indicted": *Smith* v. *The State*, 1 Hum., 399. And the reasons of the law are thus strongly stated by Judge Whyte in an early case: "The pernicious influence of an evil example is plain to every reflecting mind; and the powerful influence of this vice upon society, not only in its effect upon the relations of private life, but also as being the origin, the fomenter and the promoter of the greater portion of the public crime of the country, proves it to be what it is, an indictable offense:" *Tipton* v. *State*, 2 Yerg., 543. But this doctrine of the common law was abrogated by the act of 1842, c. 94, and by the explanatory act of 1844, c. 98, by which indictments or presentments for single acts of drunkenness are forbidden, unless the party when so drunk shall commit some other offense against the law. It will be observed, that these acts are not carried into the Code; and all public and general laws passed prior to the Code are, by it, expressly repealed: Code, § 41. The principle of the common law, therefore, which made a single act of public drunkenness indictable, is revived and is in full force in this State. No subsequent act has revived the acts referred to; but the Legislature, at the session next succeeding the adoption of the Code, enacted, that it shall not be imperative upon grand jurors to make presentments for a single act of drunkenness: Act 1859–60, c. 10. This leaves it discretionary with that body to make such presentments whenever, in its judgment, the good of society demands it. We hold the presentment in this case to be a good one.

Reverse the judgment, and remand the case for a trial.

John Preswood *v.* The State.

JOHN PRESWOOD *v.* THE STATE.

1. JUROR. *Challenge. Peremptory, or for cause.* Where nine jurors had formed an opinion from rumor in a capital case, but the record did not show that the prisoner exhausted his peremptory challenges; held that the prisoner was not entitled to the benefit of the question, whether the jurors were competent. As he does not challenge, he is held to accept the jurors.

2. EVIDENCE. *Admission without exception, not error.* The admission of illegal evidence without exception at the time, it being subsequently excepted to and excluded, is not error.

Cases cited: *Alfred* v. *State*, 2 Swan, 581; *Moses* v. *State*, 11 Hum., 232; S. C., 10 Hum., 456; *Payne* v. *State*, 3 Hum., 375; *McGowan* v. *State*, 9 Yer., 184.

FROM DE KALB.

Circuit Court, July Term, 1871. S. M. FITE, J.

J. J. FORD, for the prisoner, cited 10 Hum., 456; *Henry* v. *State*, 4 Hum., 270; *Brakefield* v. *State*, 1 Sneed, 215; *Alfred* v. *State*, 2 Swan, 582.

Attorney General HEISKELL, for the State, cited *McGowan* v. *State*, 9 Yer., 184; *Moses* v. *State*, 10 Hum., 456; *Alfred* v. *State*, 2 Swan, 581; *Carroll* v. *State*, 3 Hum., 315, 317; *Henry* v. *State*, 4 Hum., 270.

MCFARLAND, J., delivered the opinion of the Court.

The prisoner was indicted in the Circuit Court of DeKalb county, for the murder of Rachel H. Billings. At

the July Term, 1871, he was tried by a jury, who found him guilty of murder in the first degree. His motions for a new trial and in arrest of judgment, were overruled, and the judgment of death pronounced upon him, from which he has appealed to this Court.

The first ground relied upon for a new trial, is: The bill of exceptions states, that, "In the selection of the jury, nine of those selected as jurors, stated upon their examination, that they had formed or expressed an opinion concerning the guilt or innocence of the prisoner, upon rumor, and flying reports, and that they had never heard any of the witnesses speak of the case, or heard any one detail the facts or evidence in the case, and had formed their opinion merely from general rumor." The defendant's counsel excepted to the competency of these jurors, but the court held them competent.

In the case of *Alfred and Anthony* v. *The State*, 2 Swan, it was held, that an opinion formed from rumor or report, does not disqualify the juror. The same doctrine is held in the case of *Moses* v. *The State*, 11 Hum., 232, and in the case of *Payne* v. *The State*, 3 Hum., 375. In the first named case, Judge Caruthers says: "That it is not the existence of an opinion either way, which constitutes the disqualification, but the grounds upon which it is formed; or it might be speaking more correctly to say, that the law does not regard it as an opinion at all, unless it is based upon a knowledge, or reliable information of the facts."

We do not deem it necessary in this case to enquire into the correctness of these authorities quoted. The bill of exceptions does not show that the prisoner exhausted

his peremptory challenges. It was held, in the case of *McGowan* v. *The State*, 9 Yer., 184, that if a juror, incompetent on account of opinion, was selected upon the jury, and the prisoner fails to exhaust his peremptory challenges, that the objection is waived. The correctness of this rule seems to be recognized in the cases of *Moses* v. *The State*, 10 Hum., 456, and in *Alfred and Anthony* v. *The State*, 2 Swan, 581. The principle seems to be, that as the prisoner does not exhaust his challenges, he voluntarily accepts the jurors, with a knowledge of their opinions; and upon this latter ground, we hold that the objection to the jurors can not now be made. Upon these authorities, we do not feel authorized to grant the prisoner a new trial upon this ground.

The State proved by Sarah Rigsby and Lucinda Billings, statements made to them, shortly after the murder, by Inez Certain, the daughter of the deceased, some twelve or thirteen years old, as to the facts attending the murder, and as to who did the killing. This, it is admitted, was illegal evidence, but the bill of exceptions shows that no objection was made to the testimony, by the prisoner, at the time of its introduction, but afterwards his counsel moved the court to exclude the evidence, which his Honor the Circuit Judge, promptly did, remarking that had the objection been made sooner, the evidence would not have been heard.

We can not now hold this to be error. It is true that in a case involving the life of a citizen, the court would not be disposed to hold the prisoner bound by his acts in the conduct of his trial with the same strictness that would apply in a civil case. We would not suffer

injustice to be done him on account of any mere inadvertence of himself or his counsel; but we think the prisoner might, if he chose, agree to admit the illegal testimony. He might have been advised that it was better to waive exception to this testimony and admit it. Inez, the little girl whose statements are proven, was a witness. The object of the prisoner's counsel, doubtless, was to allow these statements to be proven, with a view to contradicting them. The testimony being admitted in this manner, all that the prisoner could ask would be to have it excluded whenever he moved the court to do so. This was done. And as we can not see that the prisoner has been prejudiced by the testimony, we can not reverse upon this ground.

No further exception is taken to the action of the court below. The law was fully and correctly expounded to the jury. It but remains to see whether the facts in proof create such a doubt of the prisoner's guilt as to authorize a new trial under the rules upon which this court acts in such cases. The prosecutor, James Billings, the husband of the deceased, proves that he left his house in DeKalb county, and went down the river on a raft, leaving his wife and three children at home, alone in a cabin. Inez, the oldest, was his step-daughter, the others were younger. He left home on Saturday; told the defendant, who lived about a quarter or half mile from him, that he was going down the river. He found his wife, when he returned, in her grave. He had her taken up and moved to another grave. She had been murdered in his absence. It appears fully in proof, that on the night of 29th January, 1871, after James Billings had left home, that his wife,

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Rachel Billings, was murdered. Her daughter, Inez, between twelve and thirteen years of age, proves that her mother and herself, and two little children, were at home alone; that she was awakened in the night by the dog barking; that a man came, put his hand through the crack, opened the door and came in; jerked her mother from the bed, who at the same time jerked the gun from the rack. She, witness, got the ax and struck the man. He then jerked the ax from her, and struck witness on the head, and knocked her to her knees. She then laid down behind a chair and looked through the chair. The man then struck her mother on the head with the ax, three licks, and knocked her down; he was then down on the floor with her mother, who was groaning; he remained a short time and left. He came in at the upper door, and went out at the lower door, washed his hands in the water bucket and left. Witness got back in bed and stayed until morning. She was afraid to leave. She says there was fire light in the house; that she knew the man; that it was the prisoner, John Preswood; that he was barefooted, had no hat, coat or pants on. It is proven that Inez gave the alarm the next morning to Mrs. Rigsby, who visited the house, and soon after a number of others. The body of Rachel Billings was found upon the floor dead, with one or more mortal wounds upon the head, made apparently with an ax; the ax was lying, the pole and handle bloody; the gun was also there, the gun rack being broken. The body was partly uncovered; various marks of violence were upon the body; there were finger prints upon her throat, as if she had been choked; there was the print of a bloody right hand upon the floor

near the body. The water in the water bucket looked colored, as if with blood, also the gourd handle. There were wounds upon the head of the little girl Inez, and the place where she had lain upon the floor was marked with blood. The defendant lived at his father's, between a quarter and half a mile off. It is in proof that barefooted tracks were found going from the direction of where the prisoner lived, towards the house where the murder was committed, and returning. These tracks could be traced about half or two-thirds of the way, and were then lost, owing to the nature of the ground. This track seemed to have gone in at the upper door, and gone out at the lower door of Billings' house. When these tracks were measured, and the measure applied to the prisoner's foot, the measure seemed to be a little the longest; but when the prisoner stood up and bore his weight upon his foot, the measure corresponded with the length of his foot. Part of the witnesses who first examined the prisoner, found no blood upon his clothes or person, except what appeared to be a sign of blood upon his shirt sleeves. One other witness says he thought he saw blood upon his drawers; his feet and ankles were scratched and bloody—looked as if it might have been done the night before; there were bamboo briars along the path. Some five witnesses prove that a day or two after the prisoner was put in jail, that his shirt and drawers were taken off. He was arrested the day after the murder; the shirt and drawers were identified. These witnesses prove that there were various distinct marks and streaks of blood upon these garments. It appeared that there had been an attempt to wash out these stains.

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The prisoner was a stout young man at the time, eighteen or nineteen years old; he knew that Billings was from home; he was at the house of the deceased on Friday before the murder; his manner in looking at the deceased attracted the attention of a female witness who was present. He was at the house again Sunday evening; deceased told him as he was leaving to tell one of his sisters to come and stay with her that night. He said that he would tell her, but he did not know that she could come. It does not appear that he did tell her. It is in proof that the little girl Inez had seen the prisoner often and knew him well.

Upon these facts, is there any room to doubt? The father and two sisters of the prisoner are introduced to prove an alibi. They prove that about dark, the prisoner and his three sisters went to the house of Rigsby, near by, and stayed until nine or ten o'clock; that they returned home; prisoner at once went to bed—was complaining of headache; that they heard him during the night, complaining; that he could not have gotten out of the house without their knowledge.

The two sisters are contradicted in material particulars, and are shown to have made different statements before the Justice, upon the preliminary examination; and the force of their testimony is greatly impaired; but it is manifest from their statements that the prisoner might have left the house without their knowledge. It is shown that they endeavored to get other witnesses to swear to the same facts, and when asked if they had not done so, denied it.

No evidence is introduced throwing the slightest sus-

picion upon any one else. It was in the winter season. The fact that the guilty man was barefooted, without hat or coat, would clearly indicate that he had come but a short distance.

Upon a careful and anxious review of all the testimony, we are forced to say that the prisoner's guilt is established; that he committed this most atrocious murder most probably in the perpretation of, or attempt to perpetrate, another most brutal crime.

The judgment must be affirmed.

YOUNG ALEXANDER *v.* THE STATE.

1. INDICTMENT, *for murder, need not describe wound or weapon.* An indictment for murder, which does not specify the weapon used, or describe the wound inflicted, is good.
2. VENUE. *Bill of Exceptions must state.* The Code, sec. 5242, sub. sec. 9, ouring the omission of venue in a Bill of Exceptions, is not valid.

Code construed: 5114, 5115, 5117.

FROM DAVIDSON.

Criminal Court, May Term, 1871. THOS. N. FRAZIER, J., presiding.

G. R. STUBBLEFIELD, JOHN TRIMBLE, JOHN LAURENCE and JOHN D. BRIEN, for the prisoner, insisted that the indictment was bad, citing Whar. Cr. L., 168,

(3 ed.,) 488, 489; 2 Hale, 186, Archb. Cr. Pl., 384; Hawk. P. C., b. 62; 1 Dev. (N. C.,) 139; 2 Virginia Cases; Archb. Cr. Pl. (5 ed.,) p. 51, 53, top.; 10 Hum., 121; *State* v. *Heflin*, 8 Hum., 85.

That the bill of exceptions shows that it contains all the evidence, and there is no evidence of venue. That the Code, 4542, sub. sec. 9, is in contravention of the Constitution, Art. 1, s. 9.

Attorney General HEISKELL, with E. B. MCCLANAHAN, for the State, cited the Code 5114, 5115, 5117, and insisted that the indictment was certain; that William Stewart could only have been killed once, and that a charge of killing him was as certain as any number of circumstances could make it. That the weapon was not necessary to be charged. It was no longer deodand. It need not be proved as laid. It was ridiculous to say you may charge a pistol and prove a shot gun or a cannon; charge a knife and prove a sword, battle-ax or spear. The nature of the wound need not be alleged, for, if alleged, it need not be proved as laid. It need not be alleged to be mortal, for, if it killed, it was necessarily so.

As to venue, he urged the same matters as in *Mays* v. *The State*, *ante*, p. 434; and also that it was not matter of presumption for the court, but it was a question whether the Legislature could establish a presumption. He insisted that the Legislature could declare that a general statement, that the bill of exceptions contained all the evidence should be regarded as subject to the qualification that it did not include the

evidence as to venue unless it was specially stated that it contained the evidence on that point. This was the effect of the clause objected to. The Legislature could fix the burthen of proof. They could require a special plea to put venue in issue or put the proof on the defendant, and, of course, could fix the burthen of putting facts into a bill of exceptions without affecting the constitutional right of persons to be tried in the county.

NICHOLSON, C. J., delivered the opinion of the court.

At the May Term, 1871, of the Criminal Court for Davidson county, Young Alexander was convicted of murder in the second degree, for killing Wm. Stewart, and sentenced to the penitentiary for ten years. He has appealed to this court, after his motions in arrest of judgment and for a new trial were overruled.

The first error relied on, is, that the motion in arrest of judgment was improperly overruled, because the indictment on which defendant was tried was insufficient in law. The indictment is as follows:

"The Grand Jurors of the State of Tennessee, empanelled, charged and sworn, to enquire for the body of the county of Davidson and State of Tennessee, upon their oath aforesaid, present, that on the 13th of April, 1870, in the State and county aforesaid, one Young Alexander, colored, and Michael Maloney, in and upon Wm. Stewart, did unlawfully make an assault, and him, the said Wm. Stewart, they, the said Young Alexander, col., and Michael Maloney, then and there unlawfully, deliberately, premeditatedly, feloniously and of their malice aforethought, did kill and murder, contrary to the form of

the statute made and provided, and against the peace and dignity of the State. R. S. TUTHILL,

Attorney General, &c."

The objection taken to this indictment is, that it does not state the weapon by which the assault was made and the killing produced.

An indictment is defined by Judge Story, in his commentaries of the Constitution of the United States, to be "a written accusation of an offense, preferred to, and presented upon oath, by a Grand Jury, at the suit of the Government." By section 5114 of the Code, it is provided, that "the statement of the facts constituting the offense in an indictment, shall be in ordinary and concise language, without prolixity or repetition." And by section 5115, that "in no case are the words 'force and arms,' or 'contrary to the form of the statute,' or 'moved and instigated by the devil,' or other words not essential to constitute the offense, necessary or proper." And by section 5117, "the act or omission charged as the offense, shall be stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case."

The true interpetation of these sections of the Code is, that in the statement of the offense the indictment must recite explicitly the facts which constitute the alleged crime, and not merely their supposed legal bearing. It is the simple office of the bill to exhibit the facts. If there be sufficient to constitute the crime charged, that will be judicially recognized by the court as their legal consequence.

The indictment in the present case, recites that, on

a day specified, Young Alexander made an unlawful assault on Wm. Stewart, and by such assault killed and murdered him; and that it was done unlawfully, deliberately, premeditatedly, feloniously and with malice aforethought. These are the facts recited as constituting the crime of which defendant was accused. The legal consequence of these facts, to-wit, that the defendant is guilty of murder in the first degree, is not stated. Nor was it necessary: the court was left to recognize the legal consequence to be deduced from the facts charged. The written accusation had fully performed its office when the facts constituting the offense were recited.

The object of the indictment or written accusation, is, that the accused may know "the nature and cause of the accusation against him." The question is, does this indictment enable the defendant to know the nature and cause of the accusation against him? Are the facts constituting the offense charged, so explicitly stated as to show the nature and cause of the accusation? The nature of the accusation is, that he is charged with the deliberate, premeditated and malicious killing and murdering of Wm. Stewart; and the cause of the accusation is, that he is then charged with murder. The act charged as the offense, is stated with such degree of certainty, as not only to enable him to know the nature and cause of the accusation and to make his defense, but upon conviction the Court can pronounce judgment according to the right of the case.

The statement of the character of the weapon with which the killing was effected, could add nothing to the

nature and cause of the accusation, nor could it be of any service to him in making his defense. The assault recited is not the gravamen of the charge; that is only inducement to the real charge, which is that of killing and murdering, and as the assault was followed by killing and murder as its consequence, it was not necessary to state the weapon with which the assault was made, or the killing consummated. The reason on which we have held that in an indictment for assault with intent to commit murder, it is necessary to state the character of the weapon with which the assault was made, does not apply where the indictment is for committing murder.

There was, therefore, no error in overruling the motion in arrest of judgment.

The next error relied on, is, that the court below overruled the motion for a new trial.

It is insisted for defendant, that the bill of exceptions failed to show that the offense was committed in the county of Davidson, in which county the defendant was tried and convicted; and that for that reason, a new trial ought to have been granted.

After a careful examination of the proof, as set out in the bill of exceptions, (and it professes to contain all the testimony adduced on the trial,) we are unable to find any thing which locates the killing either in the city of Nashville or in the county of Davidson. Witnesses speak of Cedar Street, and of the city, and of the Chattanooga depot, in detailing their evidence; and one witness, by way of giving the jury an idea of distance, refers to the distance to the market-house as the measure. But it is remarkable, that no one witness alludes

to the name of the city in which the killing took place, nor to any object of which we can take judicial notice, as designating the city or county. One witness refers to the Chattanooga depot as the place where his father was employed; but this allusion may as well point to the depot at Chattanooga as at Nashville.

It is not denied that the defendant could not be legally convicted, without proof that the offense was committed in Davidson county, where he was tried. But it is said, that, under sec. 5242 of the Code, defendant is not to be granted a new trial, for the reason that the bill of exceptions omits to state that the venue was proven in the court below. Such is the provision of the statute; and if we had any legal mode of knowing that the venue was in fact proven, and that the fact so proven was omitted in making up the bill of exceptions, we should be bound to hold that the defendant was not entitled to a new trial for this omission. But, in another case at the present term, we had occasion to consider and decide this question; and after reviewing the grounds of that decision, we find no reason to doubt its correctness.

The decision rests upon the constitutional provision, that the accused has a right to "a speedy public trial, by an impartial jury of the county in which the offense shall have been committed."

To make a legal conviction, it is incumbent on the State to prove that the offense was committed in the county in which the trial is had. It is clear that the Legislature has no power to force the accused to be tried in any other county, nor to excuse the prosecutor

from proving the venue. But it is argued, that, upon appeal, this court may presume that on the trial below the venue was proven, and may presume further that the proof was omitted from the bill of exceptions by inadvertence or negligence. In cases where the bills of exceptions do not show that they contain all the testimony, such a presumption might well be made. But when the record comes to us properly authenticated, and the judge below certifies that all the testimony given on the trial is contained in the bill of exceptions, we are unable to comprehend the principle upon which we can presume arbitrarily that the record is false, and that, in fact the venue was proven, and that it was omitted by inadvertence or negligence, although the judge below has certified that no such proof was made. The Legislature could not have intended to require such a construction to be placed on their action. If they did, they made an enactment not authorized by the Constitution. We so held in the case before referred to, and we now adhere to that decision.

This error, therefore, is well assigned; and as for that, a new trial must be granted, we deem it improper to express an opinion as to the sufficiency of the evidence to sustain the verdict.

The State *v.* Seth Williamson.

STATE *v.* SETH WILLIAMSON.

INDICTMENT. *House-breaking.* An Indictment for house-breaking, with intent to commit a felony, must set out and define the felony intended to be committed.

FROM WILSON.

Criminal Court, February Term, 1872. W. H. WILLIAMSON, J.

The prisoner was indicted for house-breaking, and charged in one count "with intent to commit a felony" generally; in the second count, he was charged with intent to commit a felony specially described. The defendant was convicted on the first count, and acquitted on the second, and the court below arrested the judgment, and the District Attorney appealed.

Attorney General HEISKELL, for the State.

LEE HEAD, for the prisoner.

SNEED, J., delivered the opinion of the Court.

An indictment for house-breaking, with intent to commit a felony, must set out and define the felony intended to be committed.

Affirm the judgment.

Wm. Tucker *v.* The State.

Wm. Tucker *v.* The State.

Indictment. *Robbery includes larceny.* A party indicted for robbery, may be found guilty of simple larceny.

Code cited: 4632, 4682, 5122.

FROM DAVIDSON.

Criminal Court, January Term, 1872. Thomas N. Frazier, J.

W. E. Colyer and J. T. Brown, for the prisoner, insisted that an indictment for robbery, does not include simple larceny, but does include stealing from the person; citing 3 Greenl., § 229, (Redf. ed.); also, note; Code, 4682; *Carden* v. *State*, 3 Head, 267. In these offenses the value is not material, Code, 4681, 4682; in simple larceny it is.

Attorney General Heiskell, for the State, cited 1 Archb., 308, 9; 606, n.; 1 Russ on Cr., 905; Code, 5122, 5222.

Nicholson, C. J., delivered the opinion of the Court.

Wm. Tucker and two others, were indicted in the Criminal Court of Davidson county, at its January Term, 1872, for robbery, and Tucker was convicted of petit larceny, for which he was sentenced to five years' imprisonment in the Penitentiary. He has appealed to this Court.

Wm. Tucker *v.* The State.

The error relied on for reversal, is, that in his charge, the Judge instructed the jury, that "the first count of the indictment (for robbery) includes not only robbery, but the lesser offense of larceny, which by our act of Assembly, may be either grand or petit larceny." The first count charges the defendant with robbery, and with taking various articles of personal property, and United States Treasury notes, the property of one Peter Harris, from the person of said Harris, and against his will; which property the defendant and two others, did unlawfully, feloniously and violently rob, steal, take and carry away, &c. The jury found the defendant "not guilty of the force or violence or fear, as charged in the first count, but that he is guilty of petit larceny, as charged in said first count;" and they fix his punishment at five years in the Penitentiary.

The indictment was found under the Act of 1865, c. 5, s. 3, in these words: "That, whoever shall feloniously rob another, or steal from his person, shall, on conviction thereof, suffer death by hanging: *Provided*, the jury before whom the offense is tried and convicted, may, if they think proper, commute the punishment to imprisonment in the Penitentiary for a period not less than ten nor more than twenty-one years."

This section defines and provides for the punishment of two distinct offenses—robbery, and stealing from the person—both of which are to be punished with death. It repeals, by necessary implication, sec. 4632 of the Code, which punishes robbery with from five to fifteen years' imprisonment; and sec. 4682, which punishes any one stealing from the person of another, with from three

to ten years' imprisonment. Under the Code, the offenses of robbery, and stealing from the person, were distinct offenses, being subjected to entirely different punishments. As the law stood under the Code, under an indictment for robbery, the defendant might be convicted of stealing from the person, because stealing from the person was a lower grade of the offense of robbery. But, under the act of 1865, stealing from the person is elevated to the same grade as robbery, and the same punishment is affixed to each offense. The indictment in the present case, charges the defendant with robbery alone. It follows, that on the indictment, the defendant could not be found guilty of stealing from the person—that not being an offense of lower grade than robbery, as the law now is.

But the Criminal Judge charged the jury, that under an indictment for robbery, they might find the defendant guilty of petit larceny, as that was a lower grade of the same offense. The jury found that defendant was not guilty of robbery, but was "guilty of petit larceny, as charged in the first count;" which finding was intended to be responsive to the charge that petit larceny was a lower grade of robbery. The only question, then, is, does a charge of robbery include a charge of larceny? The well settled definitions of the two words answer the question. Larceny is of two kinds—*simple* larceny, or theft, not accompanied with any atrocious circumstances; and *mixed* or *compound* larceny, which includes in it the aggravation of taking from one's house or person, as in burglary or robbery: Webster's Unabr. Dic. This definition of larceny is clearly recognized

in the Code, in defining the two offenses of larceny and robbery—the former is, therefore, a lower grade of the latter—and by sec. 5122 of the Code, the jury were warranted in finding the defendant guilty of petit larceny, that being included in the charge for robbery.

There was, therefore, no error in the charge, and the judgment is affirmed.

THE STATE *v.* SARAH MARTIN.

SPIRITUOUS LIQUORS. *Oath not to adulterate.* The act of 1859–60, c. 81, s. 4, making it indictable to sell spirituous liquors without taking an oath not to adulterate, is in force.

FROM VAN BUREN.

The defendant was convicted in the Circuit Court of Van Buren county, at the August Term, 1871, the charge being that she "did sell spirituous liquors in quantities of one quart, and in quantities, without having taken the oath and given the bond not to adulterate said liquors, as required by law." Judgment was entered for fine and costs; but W. P. HICKERSON, J., afterwards arrested the judgment.

Attorney General HEISKELL, for the State.

NICHOLSON, C. J., delivered the opinion, holding that it was error to arrest the judgment. The act of 1859–

60, c. 81, s. 4, makes the sale of liquors without oath, &c., indictable. The act of 1867–8, c. 56, repeals sec. 7 of the act of 1859–60, as to inspectors, but does not repeal the 4th section of that act.

Judgment reversed, and remanded to the court below to execute the judgment entered.

A. D. Eubanks *v.* The State.

Gaming. *Prize candy sales.* The sale of prize candy packages is gaming, and indictable.

FROM DAVIDSON.

Criminal Court, May Term, 1871. Thos. N. Frazier, J.

W. B. Bate, for the plaintiff in error, cited the case of *The State* v. *Saville*, MS., Knoxville, September Term, 1871.

Attorney General Heiskell, for the State.

Nicholson, C. J., delivered the opinion of the Court.

Plaintiff in error was indicted in the Criminal Court of Davidson county, for gaming by betting, gambling and putting in hazard fifty cents, upon a certain game of hazard and address, denominated a gift enterprise, or

prize candy sale; and for encouraging and promoting the playing at a certain game of hazard and address, denominated a gift enterprise, or prize candy sale, being a scheme or game for the chance of winning a prize of greater or less value, for money of the value of fifty cents.

A motion to quash the indictment was overruled; whereupon a trial was had upon the plea of not guilty, and verdict of guilty on the second count. Defendant has appealed to this Court.

It was proved on the trial that defendant was clerk for Burton, who was selling prize candy publicly, on the Square, in Nashville, by auction. The candy was put up in small boxes, about two inches wide and three inches long, made with a sliding drawer. Each box contained French candies worth ten cents, and each box was sold for fifty cents. Some of the boxes, besides candy, had rings, some silver half dollars, and watches and jewelry. It was guarantied that each box contained candy, and something of value not known to either seller or purchaser. It was required that each box should be opened at the time and place of sale. Each box had some article besides candy, worth from ten cents to five dollars.

The Criminal Judge charged the jury, that these facts would constitute the defendant guilty of encouraging and promoting gaming, and the jury found the defendant guilty, accordingly.

The question is, does the indictment charge facts which constitute a case of encouraging and promoting gaming, and does the evidence sustain the charge?

A. D. Eubanks *v.* The State.

Among the several definitions of gaming found in the decided cases in our State, we adopt that given in the case of *Bell* v. *The State*, 5 Sneed, 407, as probably the most comprehensive. It is as follows: "Gaming is an agreement between two or more to risk money or property on a contest or chance of any kind, where one must be gainer, and the other loser." The charge in the indictment is, that defendant encouraged and promoted a certain game of hazard and address, called a gift enterprise or prize candy sale, being a game for the chance of winning a prize of greater or less value, for money, of the value of fifty cents. The facts charged as constituting the offense, are, that there is a game of hazard known as a prize candy sale, in which fifty cents is paid for the chance of winning more or less in value than the sum paid, and that defendant encouraged and promoted this game. Assuming these facts to be true, we can have no doubt as to the sufficiency of the charge of gaming. It is the risking of fifty cents upon the chance of getting more than that sum, thereby being gainer, or of getting a less amount in value, thereby being loser, the result depending upon chance.

The charge in this indictment is entirely different from that in the case of *Saville* v. *The State*, decided at Knoxville. In that, Saville was charged with "selling Hobbs certain closed and sealed packages containing candy and some other valuable things of uncertain and unknown value and description." In that case, the Court say: "There is nothing put at hazard here; there is no risk. But there is here an absolute trade, a simple bargain and sale, in which the merchant de-

livers his goods and accepts the price. Whether that price is graduated to meet a risk on either side, we can not tell; for we are not advised either of the value of the goods or the price paid. All that is known is, that Geo. Saville sold said Hobbs a box of candy, and that he had other boxes like it, each of which contained candy and a trinket of a value indeterminate and unknown until the boxes were opened; but those other boxes he did not sell to Hobbs or to any other person, so far as the proof apprizes us." Upon these facts, the Court hold that the offense of gaming was not charged in the indictment, nor shown by the facts proved.

In the present case, the charge is not for selling boxes of candy, but for encouraging and promoting a game or scheme of hazard and address, in which fifty cents was put at risk upon the chance of getting more or less than its value. It is clear that the two cases are wholly dissimilar, and that while the indictment in the case of *Saville* v. *The State* contained no charge of an offense, in the present case there is a valid charge of gaming.

The next question is, does the evidence make out a case of gaming? In other words, does the proof show that defendant encouraged and promoted a game, or scheme, or device, in which there was an agreement between two or more to risk money or property on a contest or chance, where one must be gainer and the other loser? The proof is, Tugendrick was engaged in putting up and selling prize candy packages as a business; that he employed Burton as auctioneer to sell for him, and de-

fendant as clerk. Each package contained candy worth ten cents, and some other article of value from ten cents to five dollars. Each package was sold at fifty cents, to be opened in the presence of the auctioner. Neither the auctioneer nor the buyer knew what was in any box, except that each box was guaranteed to contain candy and some other article of unknown value.

Under these facts, the question presents itself, when a purchaser agreed to give fifty cents for one of these packages, and the auctioneer agreed to take it, was this an agreement on a chance, where one must be gainer and the other loser? The purchaser knows that there is ten cents worth of candy in the package, and the auctioneer guarantees that besides the candy, there is also some other article of value ranging from ten cents to five dollars or more. If, upon opening the package it contain an article of less value than forty cents, the buyer is loser and the seller is gainer. On the other hand, if the package contains an article of greater value than forty cents, the buyer is gainer and the seller is loser. The result, then, whether the one or the other is gainer or loser, depends upon chance, as both are ignorant of the contents of the package. It is clear it is not the candy for which the buyer gives his fifty cents. He knows the candy is only worth ten cents. What then is it that he is buying? Clearly the chance of getting a prize worth more than fifty cents. He risks fifty cents on the chance of getting more than the money paid, and thereby of being a gainer. The seller accepts the fifty cents on the chance that the purchaser will get a package worth less than fifty cents, whereby the seller will be the gainer.

Patrick Moore *v.* The State.

There is no escape from the conclusion that the facts make out a clear case of gaming. The Criminal Judge so charged, and the judgment below was according to that ruling.

We affirm the judgment.

Patrick Moore *v.* The State.

Record. *Unsigned minutes.* An entry made by a clerk, but never signed by the presiding judge, by reason of his sickness and death, showing the discharge of a jury in a capital case by consent of the prisoner, is sufficient evidence of the fact of discharge by consent.

FROM DAVIDSON.

Criminal Court, September Term, 1871. Thos. N. Frazier, J.

Bate & Williams, for the prisoner, cited the authorities generally, on jeopardy. As to the unsigned minutes, they cited the Code, 4040, 4101; *Hite* v. *State*, 9 Yer., 380; Ch. Cr. L., 459. On the clerk's power as to records: *McConnell* v. *Read*, M. & Y., 224; *Hunt* v. *Lyle*, 6 Yer., 417; *Miller* v. *Holt*, 1 Tenn., 87; *Craig* v. *Vance*, Ib., 141; *Burton* v. *Pettibone*, 4 Yer., 443; *Bass* et als. v. *State*, MS., Nashv., Dec. Term, 1870; *Allen* v. *State*, M. & Y., 606. Verity of record, *Carrick* v. *Armstrong*, 2 Cold., 266. Correction of judgments, *Farris* v. *Kilpatrick*, 1 Hum.,

379; *Crutchfield* v. *Stewart*, 1 Hum., 381; *Williams* v. *Tenpenny*, 11 Hum., 176; *State* v. *Disney*, 5 Sneed, 598. Suggested that it was the duty of the successor of Judge Smith to sign the minutes. On correction of errors in records, cited: Act of 1856, c. 70, s. 1; Code, 2877, 2878; *Elliot* v. *Cochran*, 1 Cold., 389; *Ocoee Bank* v. *Hughes*, 2 Cold., 52. Parol evidence inadmissible to change a record: *Woodyard's heirs* v. *Threlkell*, 1 Marsh., 10; *Cole* v. *Hank*, 3 Monroe, 209; 3 Dev., 423; 4 Wend., 534; *Hickman* v. *McCurdy*, J. J. Marshall, 555; *Harrison* v. *State*, 10 Yer., 542; *Johnson* v. *Johnson*, 2 Heis., 521. They quoted from *Bass* v. *State*, opinion by Judge Nelson, where, after quoting the section of the Code to the effect that the minutes of the court shall be read each morning in open court, and signed by the judge, Judge Nelson says: "This has been the law of the State, at least, since the Act of 1808, c. 49, s. 20; Car. & Nic., 205. The objects of reading and signing the minutes in open court are to enable the attorneys, suitors and the public, to know what has been done during the term; to prevent improper entries from being made upon the record; to correct mistakes before the minutes are signed; and to have the official sanction of the judge as to the correctness of the entries of each day's proceedings. It never was contemplated that the minutes should be signed at any other time or place than during the term and in the court-house, in public view, or where at least the people may attend at pleasure. A signature at chambers, when none, or a part only, of the counsel are present, is liable to the grossest abuses. A signature in another town or place, after the court has adjourned, and when business transactions may have been

forgotten, often creates the danger or suspicion of surreptitious entries, and is derogatory to that verity which has been uniformly ascribed to records. Moreover, the event of the death of the judge, before the period fixed for the signature, would create the utmost perplexity and embarrassment in regard to the unauthenticated proceedings, if his signature is necessary, as we are inclined to think it is, under the statute, to give validity to the entries upon the minutes."

Attorney General HEISKELL, for the State, insisted that the statute is directory. Similar statutes have been so held in Alabama, Georgia, Ohio and Missouri: *Bartlett* v. *Laird*, 2 Ala., (N. S.,) 162; *The Justices* v. *House*, 20 Ga., 333; *State* v. *Osborne*, 7 Ohio, 214; *Platte Co.* v. *Marshall*, 10 Miss., 347. See, also, *Hooper* v. *Ashtabula*, Wright, 708; 1 New Jersey, 337; *Sprague* v. *Litherberry*, 4 McLean, 442.

Parol evidence is admissible to supply a lost record: *Farmers' Bank* v. *Gibson*, 6 Barr., 57; Com. Dig., Evidence A., 3; *Thurston* v. *Slatford*, 1 Salk., 284; *Norvill* v. *McHenry*, 1 Man., (Mich.,) 227; *Ordinary* v. *Wallace*, 1 Rich., 507; *Young* v. *Baker*, T. U. P. Charlton, 276.

Where a clerk dies before record made up, it is regarded as lost: *Longly* v. *Vose*, 27 Me., 185; *Prudin* v. *Alden*, 23 Pick., 184; *Evans* v. *Thomas*, 2 Strange, 833; *Dayrell* v. *Bridge*, Ib., 1264. So, where no record is made: *Mayo* v. *Whitson*, 2 Jones' Law, 231: *Harris* v. *McRae*, 4 Ired., 81.

Court may, by inherent power, supply a record: *Atkinson* v. *Keel*, 25 Ala., 552; *McLendon* v. *Jones*, 8 Ala.,

300, 301; *Doswell* v. *Stewart*, 11 Ala., 629; *Deshong* v. *Cain*, 1 Duval, (Ky.,) 310.

Matters of record may be explained by parol: *Carmony* v. *Hoober*, 5 Barr., 309; *Wash., Alex. & Geo'tn St. Packet Co.* v. *Sickles*, 24 How., 336.

It is the duty of the successor to sign the unsigned minutes: *Life & Ins. Co. of N. Y.* v. *Wilson's Heirs*, 8 Pet., 291. This he must do as a form, not with knowledge of what he authenticates, but on the faith of the Clerk's official act. By the common law, the minutes were merely memoranda, from which records were made up after the term: *Waghorst* v. *State*, 7 Md., 450; 2 East P. C., 518; 1 Ch. Cr. L., 642; *Read* v. *Sutton*, 2 Cush., 115, 123; *Weed* v. *Weed*, 25 Conn., 337; *Wash., A. & G. St. P. Co.* v. *Sickles*, 24 How., 333. Clerk's entries records, until extended: *Pierce* v. *Goodrich*, 47 Me., 176. See, also, *Cromwell* v. *Bank of Pittsburg*, 2 Wall. Jr., 569; *Fowler* v. *Bird*, 2 Hemp., 213; *Frink* v. *Frink*, 24 N. H., *Taylor* v. *Com'l*, 44 Penn., (8 Wright,) 131.

Insisted that matters occurring in Court can be proved by parol, where they were matters of which no record was kept, as of the matters involved in a trial, as well as where the record was lost, showing that the record was only *evidence* of the *facts*, and was not itself the *fact* which it proved; the judgment or other judicial act. That in this case, the fact of the discharge of the jury by consent, existed; and if this was not a good record for want of siguature, the evidence of the Clerk, the next best, was competent to prove the fact, and it was fully proved in the record.

Patrick Moore *v.* The State.

FREEMAN, J., delivered the opinion of a majority of the Court.

The prisoner was indicted at April Term of the Criminal Court of Davidson county, for the murder of John Perry.

On the 27th of June, 1870, he was arraigned, pleaded not guilty, and was put upon his trial before a jury, which trial continued for several days. After the argument of the case, the jury were charged by the Court, and proceeded to consider their verdict. On the 1st day of July, an entry is made by the Court, that the jury were again respited until the next day at 9 o'clock. On Saturday, the 2d day of July, an entry appears, to the effect "that the jury returned into open court and resumed the consideration of the case;" and "the jurors aforesaid, upon their oaths aforesaid, do say, that they can not agree in a verdict." It is, therefore, considered by the Court, with the assent of the prisoner, the defendant, that the jury be discharged and a mistrial be entered in the said cause; and thereupon the prisoner was remanded to jail.

It also appears that the two entries on the 1st and 2d days of July, 1870, above referred to, were never signed by the presiding judge, Hon. John Hugh Smith, nor by any successor, judge of that court. It is known that the Judge was never on the bench after the 2d day of July, but was taken sick on Monday after, and died on Thursday.

At September Term, 1871, the prisoner was tried by a jury, and a verdict of voluntary manslaughter ren-

dered by the jury, and he sentenced to five years in the Penitentiary.

Before this, however, the defendant, by his counsel, moved for his discharge on the ground that he had been once in jeopardy, by being put on his trial before the former jury, and then interposed a special plea of "once in jeopardy," which plea was found against the prisoner; and now his counsel insist on a reversal here, on the ground that this plea ought to have been sustained on the facts, and the prisoner discharged.

It may be conceded that the prisoner, having been put on his trial, with a lawful jury, his jeopardy commenced, and that the Court could not, without the interposition of some of the well defined causes, as settled by our various adjudications on this question, discharge the jury without entitling the prisoner to be discharged from further prosecution. It is not denied that the jury may be discharged by consent of the prisoner. This brings us to the precise question presented in the case. No objection is taken to the record showing the fact that the prisoner was put on trial before a proper jury, before Hon. John Hugh Smith, and that the jury, after argument, were charged by the Court, and proceeded to consider of their verdict; but it is insisted that the entry on the 1st day of July, 1870, and the one on the 2d day of July, showing that the jury could not agree, and were discharged by the assent of the prisoner, can not be looked to as evidence of the fact of such discharge; and therefore, the only fact shown by the proper character of evidence, is, that the prisoner was once placed in jeopardy by having his case sub-

mitted to this jury, and that no legal evidence appears of his consent to the discharge of the jury from the rendition of a verdict.

We have not time, at this late day of the term, to go into a consideration or critical examination of the authorities presented on this question. We can only give the conclusions at which the Court has arrived. By section 4040, sub-sec. 4, of the Code, it is made the official duty of the Clerks of our courts "to keep a well-bound book, in which shall be entered the minutes of each day's proceedings, during the session of the court, in the order in which they are made." By section 4101 of the Code, under title, "Judicial Tribunals and their Relative Rights," it is provided: "The minutes of the court shall be read each morning in open court, and signed by the Judge."

Assuming that this last provision is for the purpose of authentication, and that the record thereby has its highest verification, in fact imports absolute verity, as any other record of a court, the question is, whether, in a case like the present, on failure to receive this last authentication by the death of the Judge, the act of the other officer, the Clerk, whose duty it is to enter the minutes of each day's proceeding in his record book, shall go for nothing, and that such minutes, so kept by him, can not be looked to as evidence of the discharge of the jury, by consent of the prisoner.

We hold, that in such case, these minutes, so kept by the clerk, may be looked to as evidence of the proceedings of the court. In support of this view, we present the question in this form: Suppose a juryman

should suddenly die during the trial, or any one of the several cases of the like kind, known to the authorities, should occur; it would be sufficient ground for discharge of the jury, without discharging the prisoner. These facts would appear on the minutes of the court, made up by the clerk, and authenticated by the signature of the judge. Certainly it will not be denied that the sudden death of the judge, during pendency of the trial, would, if properly shown, be cause for discharge of the jury, as a matter of necessity. But, admitting this cause to be a good one, on the principle maintained, such a fact could never be made to appear, as the death of the judge would forever preclude his signing the minutes of the day's proceedings. The reasons for the discharge of the jury, are entered on the minutes of the court by the clerk as part of the day's proceedings; and the death of the judge before signing them, preventing the last act of authentication, we then would be compelled to fall back on the next best evidence of the facts, that is, the official act of a sworn officer, in the performance of the duty imposed on him by law. If we reject this, we must hold, that in every case, where a judge may die, under like circumstances, it shall work a discharge of the prisoner on trial, as it is utterly impossible that the minutes of that day's proceedings shall be signed by the judge having a knowledge of the facts. A signature by a successor, we may remark, though it might formally authenticate the proceedings, or entries made by the clerk, would, in fact, be no additional evidence of their verity; as he, having no knowledge of the facts of the case, could only sign

his name to facts stated by the clerk, and it would but be the clerk's statement of facts after all.

As to the case in 2 Heiskell, 521, we only say, that it did not present the question presented in this case, nor was the question considered; as the failure to sign the minutes was not caused by the act of God, as in this case. We must, in this case, either look to the entries made by the clerk in the performance of his official duty, and treat them as evidence of what occurred in his court, or else must hold, contrary to the universal current of decision, that the act of an officer, in the performance of his duty, in which he is required to make an entry in writing, shall have no force and effect whatever; and that the act of this clerk shall not, for some cause, which we are unable to see, be held equal to the return of a sheriff or constable on an execution. We do not think sound principle requires this, or that it will either be in furtherance of a sound public policy, or tend to elevate the administration of our criminal law; nor can we, after most careful thought, see that the rights of parties charged with crime, and on trial for the same, will be in the slightest degree endangered. The case of the death of a judge under circumstances like this, is certainly an occurrence not often to be anticipated, even in that indefinite period that may be called "the life of a State;" and the principle we lay down is alone applicable, and the decision made on that precise state of facts, and no other.

We can have no kind of question, that the prisoner did give his assent, in open court, to the discharge of the jury; and therefore, as the fact appears by the entry

of the sworn officer whose duty it was to make that entry on his record book, we feel no hesitancy in saying, he has been deprived of no right, when he has been refused a discharge by the court, by reason of a fact to which he has given his assent in legal form, notwithstanding the record evidence tendered, may lack the last authentication, by the signature of the judge then presiding. The failure to so authenticate, was prevented by the act of God, and thus is satisfactorily accounted for.

The maxim, that "the act of God is so treated by the law as to affect no one injuriously;" or, as stated by Mr. Broome, in Legal Maxims, 211, "it would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, no policy prevent, should be construed to the prejudice of any person in whom there has been no laches," is appropriate to this case, and must be held equally applicable to the State as private individuals; and that other maxim, "that to which a person assents, is not esteemed in law an injury," would estop the prisoner from complaint of wrong, by the discharge of the jury.

We therefore hold, there was no error in refusing to discharge the prisoner, on the ground of his having been once in jeopardy.

As to the facts of the case, no other error of law being insisted on, we need only say, that they well warrant the finding of the jury; and we affirm the judgment of the court below.

NICHOLSON, C. J., DEADERICK, and TURNEY, concurred. MCFARLAND, absent.

Patrick Moore *v.* The State.

SNEED, J., delivered the following dissenting opinion:

The prisoner appeals in error from the judgment of the Criminal Court of the County of Davidson, upon a conviction of voluntary manslaughter. He demands his discharge upon the ground that he has been twice put in jeopardy of life or limb, for the same offense. He was indicted in March, 1869, for the murder of John Perry, and was arraigned on the 27th of June, 1870, before Judge Smith, the then presiding judge of said court, and thereupon entered the plea of not guilty, when a jury was regularly impaneled and sworn to try the issue then and there joined between the prisoner and the State of Tennessee. The testimony was heard, and the argument of counsel also, and the court charged the jury, and they retired to consider of their verdict.

These successive stages are shown by the minutes of the court to have transpired between the 27th of June and the 30th of the same month, both inclusive, and this much of the proceeding became a record by the regular signature of the presiding judge to the minutes of the court. No subsequent entry showing the progress of the cause, or the final result of the trial, is authenticated by the signature of the judge; nor does the signature of the judge before whom the prisoner was tried, appear again to the minutes during said term, or ever after the said 30th day of June, 1870.

The indictment is a valid one upon its face. At the September Term, 1871, before Judge Frazier, the successor in office of Judge Smith, the prisoner was again brought to the bar of the court to be again put upon

his trial. He filed a special plea of once in jeopardy, and demanded his discharge upon the ground that he had before been arraigned and tried for the same offense. Upon this plea the State took issue, and under the order of the court it was submitted to a jury, whose verdict was in favor of the State. And here it may be observed, that, as the issue presented a mixed question of law and fact, I see no objection to this mode of proceeding. The court thereupon proceeded to try the prisoner upon the indictment. He again, by his counsel, demanded his discharge, and declined to plead again to the indictment. The court directed the plea of not guilty to be entered, and the trial proceeded to a conviction of the prisoner.

Upon the trial of the special plea of once in jeopardy, the State introduced as a witness the clerk of the court, the prisoner objecting. The clerk stated that he was the clerk of the said court in June and July, 1870, when the prisoner was tried before Judge Smith, and that he is still clerk; that he made the entries showing the progress of said trial; that the prisoner, Patrick Moore, now at the bar, is the identical person arraigned and tried in June and July, 1870, before Judge Smith; and that the indictment and the offense are the same. He further stated that there are no other minutes in relation to said trial, which are signed by the then presiding judge. The Attorney-General asked the witness to read all other entries on the minutes in relation to the trial of the prisoner, begun on the 27th of June, 1870, and not signed by the then presiding Judge. The prisoner objected, the objection was overruled, and the clerk thereupon proceeded to read the entries made on the first of July, as follows:

Patrick Moore *v.* The State.

STATE *v.* PATRICK MOORE, } *Murder.*

Came again the Attorney-General of the State, and the jury heretofore impaneled in this cause, came here into open court, and not having agreed upon a verdict, were again respited, and placed in charge of Jos. L. Bryant, an officer of this court, who being duly sworn according to law to take charge of said jury, and keep them separate and apart from all other citizens whatsoever, until their return into court at 9 o'clock to-morrow morning.

And the said witness then read the entry of July 2, 1870, as follows:

THE STATE *v.* PATRICK MOORE, } *Murder.*

Came again the Attorney-General for the State, and the defendant in custody of the Sheriff, and the jury heretofore impaneled in this cause, returned here into open court and renewed the consideration of the same; and the jurors aforesaid, upon their oaths aforesaid, do say that they can not agree in a verdict. It is therefore considered by the court, with the consent of the prisoner, that the jury be discharged, and a mistrial entered in said cause; and thereupon the defendant was remanded to jail.

The witness further stated that he was the custodian of the records of said court, and that the entries were made by him as the orders were given by the court; that the facts related actually transpired; but that the said minutes of the first and second of July were never read over, examined or signed by the Judge; that Friday and Saturday were the said first and second days of July, and that the judge sickened on the following Monday after, and died on the following Thursday.

The witness was then asked by the Attorney-General to detail the proceedings had in said cause on the said first and second days of July, which he was permitted to do, over the objections of the prisoner. He stated that the court was duly opened Friday, and considerable business transacted; and the jury who had the prisoner's case in charge not agreeing, was respited until Saturday morning; all of which proceedings were entered by him on the minutes that night.

On Saturday morning the judge appeared, the court was opened, but the minutes of the previous day were not read, approved or signed by the Judge. After some time, the jury came into the court, were called over, and said they could not agree, and that there was no chance for them ever to agree; upon which the judge asked the prisoner, or his counsel, if he would consent to a discharge of the jury, when one of his counsel arose and said that he consented to a discharge of the jury. Whether he conferred with the prisoner upon the subject, or not, the witness does not know. The court thereupon ordered the jury to be discharged, and remanded the prisoner to jail.

The court was soon after adjourned until the following Monday morning. The proceedings of Saturday were also entered by the witness upon the minutes, but they were never read, approved or signed by the judge, who, as already stated, was taken sick on Monday, and died on the following Thursday. To all this testimony the prisoner objected.

Upon this character of testimony as to a judicial proceeding involving the life of a citizen, the prisoner was denied the benefit of his plea that he had been once be-

fore in jeopardy upon this identical charge; and by these memoranda of the clerk, and by his confirmatory oral testimony, it was permitted to be shown that the prisoner consented to the discharge of the jury which had been charged with his deliverance. In my opinion, such a fact could only be shown by a record made up and perfected by all the solemn sanctions which the law has thrown around the record of a judicial proceeding involving the life or liberty of a citizen. The minutes of a court are the memoranda of what takes place in court, made by authority of the court. From these minutes the record is afterwards made up: 2 Bouv. L. D., 183. To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and *in the form the law requires.* To give certainty, authority and verity to the judgments of the courts of record in this State, it is the imperative mandate of the law that the minutes of the court shall be read each morning in open court, and signed by the judge: Code, 4101. A single line of legislation could have given verity to a record by the attestation of the clerk, but it has not been done. And in the construction of this statute, this court has held, upon mere questions of property involving the titles of men to chattels and to land, that the minutes of a court purporting to give its orders and action and decrees, which is not sanctioned and approved by the signature of the judge presiding, is a nullity, and proves nothing: *Johnson* v. *Johnson,* 2 Heis., 521. I could not hold otherwise, when human life or liberty is imperilled. If this be so in regard to the written memoranda of judicial proceedings unsanctioned by the signature of the only per-

son who, under the law, can impart to them the verity and dignity of a record, what a leap in the dark it would seem, to permit the acts and orders and decrees of a judicial tribunal which are not lost or destroyed, but merely void or incomplete, to be established by parol. We are not permitted to explain private written contracts by parol, and a judicial proceeding should not be degraded to a lower dignity than a deed or a contract. I take it to be a principle as old as the common law, that an imperfect record can not be assisted by evidence *dehors* the same: *Otey* v. *Rogers*, 4 Ired., 589; *Wade* v. *Odeneal*, 3 Dev., 423; 1 Wash. C. C., 330, unless in the cases specified by statute where clerical mistakes and omissions from inadvertence may be corrected by the court whose judgments are thus found to be defective. It is unnecessary to advert to the abuses, the evils and confusion which would inevitably follow the establishment of such a precedent. I hold, therefore, that there is absolutely no evidence before us that the prisoner ever consented, either by himself or his counsel, to the discharge of the jury, which had been lawfully and regularly charged with his deliverance upon a valid indictment on the 27th of June, 1870.

It remains to be considered, then, what was the effect of that proceeding upon the rights of the prisoner in his subsequent arraignment, in September, 1871. He stands upon the constitutional guaranty, that no person shall, for the same offense, be twice put in jeopardy of life or limb:" Const. Tenn., Art. 1, s. 10. When a jury, lawfully impanelled and sworn, are charged with his fate, his jeopardy begins. That jury may be law-

fully discharged by the prisoner's consent, or for any of the causes recognized and approved in the law, and this shall be no legal impediment to his subsequent trial. But such a lawful discharge must be made to appear.

The jeopardy of a prisoner is when a trial jury is sworn and impanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance: 1 Bailey, 655; 7 Black., 191; 1 Gray, 490; 8 Serg. & R., 586; 1 Bish. Cr. L., § 660. And so jealous are the courts in protecting this right, that it has been held, and has been accepted everywhere as a principle of criminal jurisprudence in this country, that where the legal bar has once attached, the government can not avoid it by varying the form of a charge in a new accusation. If the first indictment or information were such that the accused might have been convicted under it, on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached upon the first must constitute a protection against a trial on the second: 1 Green., 360; 12 Pick., 504; 17 Wend., 386; 19 Ohio, 423; 7 Conn., 414; Cooley C. L., 338.

We have in this case, then, the valid and undoubted record evidence that Patrick Moore, the prisoner at the bar, was put upon his trial before a competent court, upon a valid indictment, and that a jury, lawfully impanelled and sworn, was charged with his deliverance, on the 27th June, 1870; but we have no evidence that said jury was ever lawfully discharged. His jeopardy, therefore, in the sense of the constitution and the law,

was complete and perfect. We have the testimony before us, also, that this same person was brought to trial upon the same indictment, at the September Term, 1871, and that he then and there demanded his discharge upon the authority of the constitutional guaranty that no person shall for the same offense, be twice put in jeopardy of life or limb—a guaranty which, under the organic law of this country, can not be denied to the peasant or the prince, to the lofty or the lowly. Upon such a case, whatever his crimes may be, the law adjudges him to be free. The view of this question presented by the majority of the Court, has much force in it; but, in my judgment, the reasons are stronger on the other side. The discharge of a jury is a judicial act; the consent of the prisoner to such discharge enters into and becomes a necessary part of such a judicial act, and must be matter of record, and a judicial record must prove itself. With the greatest respect and deference to the opinions of my learned brothers of the bench, I can not assent to a doctrine that seems to permit the proof of a solemn judicial act of a court of record, otherwise than by a judicial record. To the argument based upon the abuses and inconveniences which might follow the adoption of my view of this question, it would seem sufficient to reply, "*nolumus mutare leges Angliæ.*"

I am of opinion that the prisoner is entitled to his discharge.

ALEXANDER SMITH *v.* THE STATE.[1]

CARRYING WEAPONS. *Act of* 1870, *construed. A Journey.* Under the Act of 1870, c. 13, prohibiting the carrying of pistols, &c., but excepting from its provisions persons on a journey out of their State or county, it is not every going out of the county that constitutes a journey. A party who carries the prohibited weapons when traveling around in the neighborhood of his home, though in an adjoining county, is not within the exception of the act.

FROM COFFEE.

Circuit Court, September Term, 1871, before W. P. HICKERSON, J.

S. E. CARNES, for the plaintiff in error.

Attorney General HEISKELL, for the State.

SNEED, J., delivered the opinion of the Court.

The plaintiff in error was convicted, in the Circuit Court of the county of Coffee, of the offense of carrying a pistol about his person, under the Act of 1870, c. 13. By the third section of that act, "persons who are on a journey out of their State or county," are, among others, specially exempted from its operation. Upon the trial, it was shown that the

[1]This case was omitted at its proper place by oversight, and is therefore printed here.

plaintiff in error resided in the county of Warren, but within half a mile of the line of Coffee county, and that he was carrying the weapon while riding through the neighborhood in Coffee county, not exceeding a dozen miles from his home in Warren. This, it is insisted, was a "journey" in the sense of the statute; and it is urged that the statute being highly penal—embracing imprisonment in the county jail among the penalties for its violation—ought to be strictly construed. Upon this subject His Honor, the Circuit Judge, instructed the jury as follows: "The word journey, as used in the Act, implies something more than a travel of a few miles in the neighborhood of the party. Mr. Webster says it is 'the travel of a day.' Again the word journey suggests the idea of a somewhat prolonged traveling for a specific object, leading a person to pass directly from one point to another. You will apply the above definition to the facts of this case; and if you find that the defendant was on a journey out of his county or State, at the time of carrying the pistol, you will acquit him; but if he was not, you will convict him. If you should believe from the evidence that the defendant lived in Warren county, near the line of Coffee or Coffee and Grundy, and carried the pistol when traveling around in the neighborhood of his home, but in Coffee county, then, under such a state of facts, if they exist, the Court is of opinion he would not be on a journey within the meaning of the third section of the Act, and he would be guilty; and this would be so, al-

though he may have traveled five, six or seven miles from his home; and, although he may in such travel around home cross not only the Coffee county line, but also the line of Grundy county."

We see no error in the charge of the court upon this subject, and think the learned Judge has fallen upon the correct definition of the word journey in the sense of this statute. Whatever be the literal sense of the term, it was surely not intended that the word "journey," in the sense of this statute, should embrace a mere ramble in one's own neighborhood across the lines of contiguous counties. If so, a very wise and salutary statute has emasculated itself, and is deprived of half its efficiency for good. It is true, the Legislature has not undertaken to define a journey, or to say whether it shall be a long or short one, but has left the courts to interpret it in the light of good sense, and with regard to the spirit and intent of the statute itself, with the positive injunction in the fourth section of the Act that the courts shall give it a liberal construction so as to carry out its true intent and meaning: Shank. Supp., 96. It was thought proper to except persons on a journey out of the county from the operation of the Act that they might provide themselves, if necessary, with weapons defensive against such possible perils of the highways as are not supposed to exist among one's own neighbors. The evil intended to be corrected is the carrying of deadly weapons on the streets, in society, in the community, or among the people with whom we are in the habit of

associating—a habit which will ultimately convert a good man into an assassin, and a brave man into a coward.

Let the judgment be affirmed.

NOTE.—In *Lacefield* v. *The State*, Jackson, April 27, 1872, it was held, NICHOLSON, C. J., delivering the opinion, that the conviction was right, where the defendant started on a journey which might take him out of the county or terminate within it, and where he armed himself, after the journey had terminated within the county, and when he was on his return and within a few miles of home.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE,.....DECEMBER TERM, 1870.

H. E. HYDE *v.* W. J. DARDEN.

1. PLEADING. *Averment must be specific.* A declaration upon a written promise by the assignor of a note to pay it, with a recital that it has been put into a deed of trust of the maker, concluding: "if said deed satisfies the above note, then this obligation to be void," must contain an averment that the deed of trust has been foreclosed. An averment that the deed has failed to satisfy the note, is not good.

2. CONSTRUCTION. *Intent to prevail.* The construction of an instrument is to be arrived at, not only from its terms, but from the circumstances under which it is made, the motives which induced it, and the purposes and objects of it.

3. CONDITION. *Precedent and subsequent.* Whether a condition be precedent or subsequent, depends upon intention, not form.

FROM ROBERTSON.

Circuit Court, October Term, 1868. JNO. ALEX. CAMPBELL, J.

H. E. Hyde *v.* W. J. Darden.

STARK & JUDD, for plaintiffs, commented on 1 Ch. Pl., 333, (8 Am. ed.); Cited *Carroll* v. *Foster*, 3 Yer., 468; *Ib.*, 461; *Hughes* v. *Smith*, 5 Johns., 168; *Fletcher* v. *Peck*, 6 Cr., 127; *Michie* v. *The Governor*, 4 Hum., 486.

JAMES M. QUARLES, for defendant, cited *Blair* v. *Billingsly*, Peck, 85, 89, and cases cited; *McNairy* v. *Thompson*, 1 Sneed, 141; *Carnes* v. *Apperson*, 2 Sneed, 562; 1 Chitty Pl., 321 to 328; 2 *Ib.*, 555; 2 Saund., 352.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff sued the defendants in the Circuit Court of Robertson county, upon the following obligation: "We, the undersigned, promise to pay H. E. Hyde, one hundred and seventy-five dollars, it being for a note that I, W. J. Darden, transferred to said H. E. Hyde, on M. L. Andrews, D. S. Andrews, and Jas. W. Andrews, for one hundred and seventy-five dollars, due December 25th, 1866, bearing interest from date, March 3rd, 1866, which note said M. L. Andrews, D. S. Andrews and J. W. Andrews have put in their deed of trust. Now, if said deed satisfies the above note, this obligation is to be void, otherwise in full force. April 5th, 1867.

W. J. DARDEN, [*Seal.*]
Securities, { G. H. DARDEN, [*Seal.*]
JANE DARDEN, [*Seal.*]"

The declaration avers breaches of the obligation sued on, in the following language: "The plaintiff avers that the defendants have breached their obligation in this, that said deed aforesaid has failed to satisfy and pay the said note above described," etc., "and defendants have not paid," etc.

H. E. Hyde *v.* W. J. Darden.

The defendants demurred to the declaration: 1. Because the obligation sued on was not, in legal effect, due at the time of the institution of the suit.

2. That it is not averred in the declaration that the trust deed, in which the note transferred is secured, is settled and wound up, and that the trust assets were insufficient to pay said transferred note, etc.

The court sustained the demurrer, and the plaintiff appealed in error to this court.

The question arises as to what is the proper construction of the obligation sued on.

The intention of the parties to a contract is to be ascertained, not only from the language employed, but also by looking to the circumstances under which it is made, the motives which induced it, and the purposes and objects of it.

When the intention is thus ascertained, it is the duty of the court to enforce it, as the parties mutually understood it at the time it was made.

When there is a condition, or qualifying stipulation, contained in the contract, whether it shall be construed to be a condition precedent or subsequent, does not depend upon the use of technical words, nor does it depend upon what part of the instrument the words constituting the condition may be placed in, but rather upon the intention and understanding of the parties, at the time of making the contract.

In this view, what is the substance of the agreement in this case? It is, that W. J. Darden, having transferred to plaintiff a certain note which was secured by deed of trust, agrees, and the other two parties, signing

the obligation as his sureties, agree with him, that if the fund arising from the trust property, upon foreclosure of the deed, should be insufficient to pay the note, then the obligors in the instrument sued on would pay it.

It is not an absolute or unconditional agreement to pay the note already secured by a deed of trust, but a collateral undertaking to pay, upon the condition precedent that the plaintiff should do all things necessary and proper to be done by him, to secure payment out of the trust fund.

It was the intention of the parties, as manifested by a fair interpretation of their contract, that the trust fund was to be first resorted to for the satisfaction of the note secured in the trust deed, and the fund arising therefrom exhausted, before satisfaction could be claimed off defendants.

The declaration ought, therefore, to have averred, not simply that the trust deed has failed to pay said debt, but such facts as will show that the failure to pay was because of the exhaustion of the fund arising from the sale of the trust property, in the due execution of the trust.

The demurrer was, therefore, properly sustained, and we affirm the judgment.

R. G. Glover, Adm'r, *v.* Seburn Holman *et al.*

R. G. GLOVER, Adm'r, *v.* SEBURN HOLMAN AND J. D. SHEPHERD.

1. JUDGMENTS: *Void and voidable.* A judgment rendered before a Justice of the Peace, before the return-day of the warrant, is not void, but erroneous.
2. CERTIORARI. *Court must act upon grounds laid.* A *certiorari* granted to re-try a cause, does not authorize a court to quash the execution issued on an erroneous judgment, without trial.

FROM ROBERTSON.

Circuit Court, February Term, 1867. JNO. ALEX. CAMPBELL, J.

STARK & JUDD, for plaintiff, on void and voidable judgments, cited Cooke, 193, 197; Willes, 199; 1 Saund., 313; 2 Strange, 996; 2 Wilson, 382; 1 Hay., 414; 2 Meigs' Dig., p. 641; 1 Hum., 332, 334: Commented on *Trousdale* v. *Donnell*, 4 Hum., 273, and *Winchester* v. *Beardin*, 10 Hum., 247: Cited *West* v. *Williamson*, 1 Swan, 277. On the right of a stayor to attack judgment, they cited *Talliaferro* v. *Herring*, 10 Hum., 272, and *Lownes* v. *Hunter*, 2 Head, 343.

DEADERICK, J., delivered the opinion of the Court.

Suit was brought before a Justice of the Peace of Robertson county, upon a note for $80, executed by W. H. White, payable to defendant, Holman, due December 25, 1858.

R. G. Glover, Adm'r, *v.* Seburn Holman *et al.*

The warrant issued August 1, 1859, against White the payor, and the defendant, Holman, the payee, in favor of T. B. Matthews, for the use of B. Clenard.

The constable to whom it was issued returned it with the following indorsement: "Executed, and set for hearing on the 29th day of October, 1859, before Jesse B. White, at —— o'clock; this 25th October, 1859.

D. L. RAULS, Con."

On October 25, 1859, judgment was rendered against W. H. White, and defendant Holman and defendant J. D. Shepherd, by the name of J. Shepherd, is entered as stayor, as appears from the record.

In May, 1866, an execution issued against Holman and Shepherd, and was levied upon the property of Shepherd; and thereupon he and Holman file their petition for writs of *certiorari* and *supersedeas*, alleging that White, the payor, is dead, and that the said judgment is void and unjust, as against them.

The said Holman alleges that he knows nothing of said note, never heard of it, nor had or owned any such note; was never summoned upon the warrant, and had no knowledge of said judgment until the execution was issued a few days before the filing of the petition. Defendant Shepherd states that he never stayed said judgment, nor authorized any one to enter his name as stayor; that his name is James D., and not J. Shepherd.

Petitioners also charge that the judgment is void, because the day fixed by the constable in his return for the trial, was 29th October, and the judgment was rendered 25th October, as appears from the warrants and returns thereon.

The cause was brought into the Circuit Court, and the

defendants at February Term, 1867, entered a motion to quash the execution, upon the ground that the judgment upon which it was founded was void upon its face.

The court being of opinion that the judgment was void upon its face, quashed the execution, and the plaintiff appealed in error to this court.

In this, we think, the Circuit Judge erred. The judgment, upon its face, was not void, although it was irregular. Upon the face of the papers the warrant seems to have been regularly issued and served upon defendant Holman, and defendant Shepherd appears as stayor of the judgment. The Justice, therefore, upon the face of the papers, had jurisdiction of the cause, but his rendition of the judgment, on a different day from that fixed for the trial, made such judgment irregular and erroneous. The case of *West* v. *Williamson*, 1 Swan, 277, is analogous with the present case. There the execution was quashed by the court below, because the judgment of the Justice was rendered upon a day subsequent to the day fixed for trial. This court said the judgment was not void, and there was no reason for quashing the execution; but defendant not having had notice of the time of trial, nor opportunity to make his defense, should have another trial, and ordered the cause back to the Circuit Court, to be tried upon its merits. In this case, the defendant had no notice of the time of trial, the cause having been tried before the day fixed for the trial.

The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded, that the defendants may have opportunity to make the defenses relied upon in their petition; and especially is this the appropriate rem-

James Bradley *v.* M. C. Dibbrell.

edy in this case, as the *certiorari* is invoked by petitioners solely for this purpose. They do not ask that the execution may be quashed, but pray that the cause be brought up into the Circuit Court, to be re-tried.

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JAMES BRADLEY *v.* M. C. DIBBRELL.

1. SALE OF LAND. *Deficiency. Land not in possession.* Where in a sale of several tracts of land, the vendor included nineteen and three-fourth acres, which he represented to be his, but to which he had no title, and which he did not have possession of, nor deliver to purchaser, it was held that a bill in equity would lie to have compensation for the deficiency.
2. SAME. *Eviction.* In such case it is not necessary to aver eviction.
3. CHANCERY PLEADING. *Bill and amended bill.* Where original and amended bills are filed, they are both to be looked for to support the complainant's case, on demurrer to the amended bill.
4. PRACTICE. *Verification of answer.* An exception to an answer coming from another State, because it is certified by a justice of the Peace, without the certificate of the Clerk of his court, to his official capacity, required by Code 4398, is good, and should be sustained.

Cases cited: *Stipe* v. *Stipe*, 2 Head., 170; *Miller* v. *Bentley*, 5 Sneed, 675; *Meek* v. *Bearden*, 5 Yer., 471; *Young* v. *Butler*, 1 Head., 648; *Williams* v. *Hogan*, Meigs, 187.

FROM WHITE.

Chancery Court at Sparta, March Term, 1860. S. J. W. LUCKY, Ch., presiding by interchange, overruled the demurrer. Final decree, September Term, 1867, before B. M. TILLMAN, Ch.

S. H. COLMS, for complainant, cited, as to demurrer, *Woods* v. *North*, 6 Hum., 309 to 313; 4 Hum., 66; 1

Head., 640. On the verification of the answer, he cited, Code, 4398.

NELSON, J., delivered the opinion of the Court.

The demurrer to the amended bill was properly overruled by the Chancellor. Taken in connection with the original bill, the case stated, is briefly, as follows: That Daniel Griffith, on the 10th of April, 1848, conveyed to the complainant, six tracts of land, by metes and bounds; the deed containing a covenant of warranty; that, among them is a tract of thirty acres, of which neither of the parties ever had possession; that, of this thirty acres, nineteen and three-fourth acres were claimed and held by John Jetts, and his heirs, under grants No. 2496, dated 31st of August, 1825, which was the older and better title; that Griffith falsely and fraudulently represented that he had a good title to said nineteen and three-fourth acres, when in truth and in fact, he had not; that complainant is entitled to compensation for the deficiency; that defendant Griffith, is a non-resident, but M. C. Dibbrell has a small fund in his hands, which complainant prays to have subjected by attachment. The grounds of demurrer relied upon, are: 1st, That a court of equity has no jurisdiction; and, 2d, That the amended bill does not aver a warranty of title.

Waiving the objection that the first cause alleged is not specially stated as required by the Code, it is a sufficient answer to it to say, that the case is not, exclusively, of legal cognizance, and it was not necessary to aver an eviction. The defendant was not in possession at the time

of the sale, nor did complainant ever take possession, as the land was adversely held by Jett, or his heirs, at the time of the sale. The bill proceeds upon the ground of fraud and misrepresentation, and title in another at the time of the sale, and might well have alleged that, as to the nineteen and three-fourth acres, the contract was void for champerty. In such a case, the doctrine as to eviction does not apply: see *Stipe* v. *Stipe*, 2 Head., 170; *Miller* v. *Bentley*, 5 Sneed, 675; *Meek* v. *Bearden*, 5 Yer., 471; *Young* v. *Butler*, 1 Head., 648–649; *Williams* v. *Hogan*, Meigs, 187.

2. The deed from Griffith was exhibited with the original bill, and shows a sale by the acre, with a covenant of warranty. Upon the demurrer, the amended and original bill are to be taken as one, when relating to the same subject matter; and, as the original bill set out the deed, the want of title, and the deficiency in the number of acres, and the amended bill charged fraud and misrepresentation in the sale, it was unnecessary again to exhibit the deed. The covenant contained in it, is a sufficient answer to the second ground of demurrer.

3. The exception to the answer was properly sustained by the Master. It was sworn to before John Ensley, a justice of the peace, for Fulton county, Arkansas, on the 16th of July, 1861; but there is no certificate of his official capacity, by the Clerk of the court in which he presides, as required by the Code, section 4398.

The bill having been taken for confessed; and it appearing, also, from the evidence, that Griffith had no title, as alleged in the bill; and the value of the land, at

the time of the sale, having been fixed by the proof, there is no error in the Chancellor's decree, and it will be affirmed.

W. S. SAYLORS *v.* ABRAHAM SAYLORS ET ALS.

1. MORTGAGE. *To surety, available to creditor.* A mortgage executed by a debtor directly to his surety, to be void if the debts are paid, is for the security of the creditors as well as the surety.
2. SAME. *Sale by mortgagor and mortgagee.* Such mortgage made without a power of sale by the mortgagee, precludes a sale of the property by the mortgagor, with the consent but without the joinder of the mortgagee, unless with consent of the creditors, or with satisfaction of their debts. A payment to the surety will not be sufficient.
3. SAME. *Creditor and surety.* A creditor and surety are respectively entitled each to the benefit of the securities of the other for the payment of the debt in which they are interested.
4. INNOCENT PURCHASER. *Plea of.* A statement in an answer by the purchaser of land, under such a mortgage as above, that when he purchased he paid a part of the purchase money to the mortgagee, and it was his understanding that the mortgage debts were to be paid; that he thought he had a good title, and that a purchaser from him understood it in that way, is not good as a plea of innocent purchaser.
5. SAME. *Same.* A plea in answer, averring the payment of the purchase money, partly in cash notes, but which did not aver that the vendor was seized or pretended to be seized in fee, or state who were the makers of the cash notes, or that the beneficiaries in the outstanding mortgage had knowledge of his purchase, and in other respects failed to meet the requirements of the numerous decisions of this court, can not be maintained as a plea of innocent purchaser.
6. FRAUDULENT CONVEYANCE. *Vendor retaining possession.* The mere fact of a mortgagor remaining in possession of personal property, and of

his afterwards disposing of it without the consent of the mortgagee, does not prove the deed fraudulent, or avoid it, as to the lands conveyed in the same deed.

7. SURETY OR ASSIGNOR. *Bill quia timet.* A surety or assignor liable to pay a debt on the failure of the principal debtor, may sustain a bill *quia timet* before payment made or loss incurred.

8. SAME. *Same. Assignee, or creditor, necessary party.* In such case, the assignee ought to be a party to the record; and if he is not, the decree must show that the recovery is for his benefit.

9. PRACTICE IN SUPREME COURT. *Remanding cause.* On failure to make proper party, the Supreme Court will, in proper cases, in aid of substantial right, remand to the Chancery Court to make proper parties.

10. PRACTICE. *Party made on petition.* A person having an interest may become a party to proceeding for his benefit, by petition in the cause.

Cases cited: The cases digested in Heis. Dig., 391 to 393, and 552 to 556: *Breedlove* v. *Stump*, 3 Yer., 257, 263; *Stockard* v. *Stockard*, 7 Hum., 303, 307; 2 Sneed, 93; Meigs' R., 169; 3 Hum., 547; 2 Head., 302; *Ib.*, 549; 5 Sneed, 91; 2 Cold., 91; *Williams* v. *Tipton*, 5 Hum., 67; *Gilliam* v. *Esselman*, 5 Sneed, 88, 89; *Henry* v. *Compton*, 2 Head., 552; *Howell* v. *Cobb*, 2 Cold., 105, 106; *Kinsey* v. *McDearmon*, 5 Cold., 395; *Greene* v. *Starnes*, 1 Heis., 582; *Birdsong* v. *Birdsong*, 2 Head., 298, 301, 302; *Mims* v. *Mims*, 1 Hum., 430, 431; *Rowan* v. *Mercer*, 10 Hum., 361, 364.

FROM WHITE.

Chancery Court at Sparta, September Term, 1868, before B. M. TILLMAN, Ch.

S. H. COLMS, for complainant, cited: 3 Sneed, 462; M. & Y., 323, 332; 10 Yer., 335; 2 Yer., 193 to 199; *Ib.*, 509 to 513; 1 Yer., 71 to 73; *Ib.*, 302; *Ib.*, 337, 338; 1 Hum., 491 to 497; 6 Yer., 108 to 118.

SAVAGE, for respondent, cited; *Burrow* v. *Henson*, 2 Sneed, 658.

W. S. Saylors *v.* Abraham Saylors *et als.*

NELSON, J., delivered the opinion of the Court.

Prior to the year 1861, but at a time not distinctly stated, complainant held certain notes on E. J. Russell, amounting to $470, which he transferred to A. C. Young, who obtained judgments thereon, in the month of March, 1861, before a justice, against complainant and said Russell. Russell procured one Sandy Hickey to become stayor of the judgments; and, for his indemnity, executed to him an informal mortgage, upon the three hundred acres of land, and certain personal property in the pleadings mentioned, bearing date and registered on the 29th of March, 1861. The mortgage contains no power of sale, but was executed for the implied purpose of indemnifying said Hickey, as security of the mortgagor to four different creditors, whose debts are described; and, among them the debts due to Young, which, as the deed recites, was to be stayed by the mortgagee for the mortgagor. Russell, the mortgagor, was permitted to retain possession of the property. Part of the personal property was sold or disposed of by him, a part by his wife after he went into the army; two of the "colts" died, and the residue was lost during the war. He paid one of the debts, provided for in the mortgage, of $230, due to Daniel S. Brown, leaving the other debts therein mentioned unpaid. On or about the 26th of October, 1862, Russell sold the land to Absalom Martin, who states that he paid therefor $665, in Confederate money, and $885, in horses.

Russell, in his deposition, states, that Martin was to make payment in Confederate money, but actually paid in horses, "at low prices," which he, Russell, took to Missis-

sippi, and sold. Martin and Russell concur in the statement that Hickey had knowledge of the sale, and Martin states that he handed "$500, or the rise," to Hickey, and his understanding was, that it was to go to the satisfaction of the deed of trust.

Russell executed a deed to Martin, to which Hickey was a witness, and Martin took possession of the land and held it for a few months, when he sold it to Abraham Saylors. The deed from Russell to Martin was not registered, and when Martin sold to Saylors, it was delivered up and a deed was executed in its place, by Russell to A. Saylors, on the 4th of October, 1862, which was duly registered 4th of September, 1865; and, under this deed, Saylors, the defendant, claims title. The consideration paid by A. Saylors, was $1,950, in horses, cash notes, and Confederate money; the precise proportions of each not being stated. Martin states it as his understanding, when he paid the Confederate money to Hickey, that the mortgage debts were to be satisfied; that he thought he had a good title, and that A. Saylors understood it in that way; but admits that none of the beneficiaries named in the mortgage were present, or had any knowledge of these transactions. Russell states that when he made the trade with Martin, the latter knew that the mortgage deed was in existence, and that they talked about about it, but says he gave A. Saylors no information on the subject. He says, further, that he and Hickey were, at one time, brothers-in-law, and that he afterwards married Hickey's daughter, but that Hickey had no previous knowledge of his intention to dispose of the personal property. It is also shown that Hickey and Abraham

Saylors are brothers-in-law. A. L. Potts, sheriff, states that he, at one time had executions in his hands, on the judgments in favor of Young, against complainants, Russell and Hickey, and that he could find no property of the two latter on which to make a levy. There is some parol evidence tending to show that Hickey owns a small tract of land in Cumberland county, worth about $200, and that complainant lives in Putnam county; but this evidence is of little consequence in the view we take of this case.

It may be observed that the defendant, A. Saylors, does not, either in form or substance, plead that he is an innocent purchaser for a valuable consideration without notice. He virtually admits that when he purchased the land, he had full knowledge of the existence of the deed of trust, but places his defense upon the grounds that the deed, as he alleges, was fraudulent, and that he had satisfactory information from Russell, Hickey and Martin, that the deed of trust was released and discharged, and that the deed from Russell to Martin was witnessed by Hickey. He states that he paid Martin $1,850 for the land—$593 in cash notes, $75 in a horse, and the balance in money—but does not aver that the vendor was seized or pretended to be seized in fee, or state who were the makers of the cash notes, or that the beneficiaries had knowledge of his purchase; and, in other respects, his defense fails to meet the requirements of the numerous cases heretofore determined by this Court, and cited in Heis. Dig., 552, 556.

The mere fact that Russell was permitted to retain possession of the personal property, conveyed by the mortgagor, and that he disposed of it without the knowledge or concurrence of Hickey, did not render the mortgage void as to the land: See cases cited in Heis. Dig., 391, 393.

The mortgage, as already stated, is informal. It conveys to Silas Hickey, in addition to the personal property, the tract of 260 acres of land in White county, in fee simple, and then follows the declaration: "But this deed is made for the following uses: that is to say, that the said Hickey is my security to W. L. Gracey on a debt for $150; to A. Ditty on a note for $125; is to stay a debt for me, going to A. C. Young, for $470; and, also, to secure a debt due from me to Daniel P. Brown for $230, and pay the same for me, or stay it, if sued upon same. Should I pay all of said debts above named, then, and in that event, this deed is to be void; then [otherwise] to be and remain in full force and virtue in law." This provision in the deed is a sufficient declaration, in the view of a Court of Equity, of a trust in favor of the creditors therein named, whose debts were secured, or intended to be secured, through Hickey, the mortgagee. In the case of *Breedlove* v. *Stump*, 3 Yer., 257, this Court, John J. White, Special Judge, delivering the opinion, declared that "the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself." It was said further, that "the cred-

itor is entitled to the benefit of all the securities the principal debtor has given to his surety, and that the surety has an equity to the benefit of all the securities the principal gives to the creditor:" *Ibid*, 263. In *Stockard* v. *Stockard*, 7 Hum., 303, where it appeared that W. Craig was the drawer of a note, upon which Johnson Craig was first, John Stockard second, and Samuel Stockard third indorser; and that Craig, the maker, and his wife, had sold a tract of land to Samuel Stockard, the last indorser, who agreed to pay the note out of the purchase money, but afterwards credited it, upon a settlement of their accounts, on a claim which he personally held against Craig, in consequence of which John Stockard, the second indorser, was compelled to pay the note, it was held that the law implied a trust for the benefit of the second indorser, whose assent to the arrangement, as it was for his benefit, was presumed. In that case, it was expressly declared that the trust can not "be revoked after the trustee had taken upon himself the trust, unless the beneficiary dissents therefrom:" *Ibid*, 307; see also 2 Sneed, 95; Meigs R., 169; 3 Hum., 547; 2 Head, 202; *Ibid*, 549; 5 Sneed, 91; 2 Cold., 91, on the general subject of suretyship and substitution. It follows, from these authorities, that the mortgage executed to Hickey enured to the benefit of all the creditors named therein; that as no power of sale was vested in Hickey, he could not sell, or assent to the sale of the land, without the assent of the beneficiaries, or the aid of a court of equity; that the registration of the mortgage was, of itself, notice to Abraham Saylors; and especially, that as

its existence was spoken of at the time of his purchase, he was bound to ascertain from the beneficiaries, and not from the statements of the mortgagor and mortgagee, whether the debts intended to be secured had been satisfied; and, failing to do so, the deed taken by him is fraudulent and utterly null and void as to such of the creditors as have not been paid: *See Dixon on Subrogation,* III.

Whether the complainant, without paying the debts for which he is liable, is entitled to a decree, is a question not entirely free from embarrassment. In *Williams* v. *Tipton,* 5 Hum., 67, it was held that the sureties to an official bond of a sheriff, who had been compelled to make certain payments on account of the defaults of their principal, and filed their bill, in anticipation of further liabilities, to set aside a fraudulent conveyance made by him, could only be relieved to the extent of the actual payments made by them, and could not, upon a *quia timet* principle, maintain their bill before loss incurred or payment made. In *Gilliam* v. *Esselman,* 5 Sneed, 88, 89, it was held that no equity exists in favor of a surety, to be substituted to the rights of the creditor, without having previously discharged the debt. In *Henry* v. *Compton,* 2 Head, 552, it was determined, in accordance with certain North Carolina cases there cited, that, where the principal debtor has become insolvent, and his property is bound for the debt to the creditor, "his sureties have an interest in it, so far as to compel its application to their discharge and exoneration, in preference to the general creditors of their principal, or purchasers from him;" and this

without a previous payment of the debt. A similar principle was announced in *Howell* v. *Cobb*, 2 Cold., 105, 106. See, also, *Kinsey* v. *McDearmon*, 5 Cold., 395. In *Green* v. *Starnes*, 1 Heis., 582, that, within the meaning of the Code, section 4288. as to setting aside fraudulent conveyances, "a surety, before payment of the debt, is a creditor, in such a sense as that he may bring his principal and the creditor into a court of equity, and obtain exoneration out of the property, real or personal, fraudulently conveyed by the former, or its proceeds in the hands of any one who is not a *bona fide* purchaser without notice." The complainant in this case, as indorser upon the notes, stands in the relation of surety of Russell, the maker. Judgments were obtained against him as well as Russell; and there can be no question that, on payment of the judgment, he would have a remedy against the maker. The security taken by the stayor enured to his benefit as well as that of the creditor, and as the conveyance to the defendant was fraudulent, no sound reason exists why it may not be set aside in favor of the one as well as the other. Any decree obtained by the complainant, would enure to the benefit of the creditor; and, although it would have been more regular to bring the latter before the Court, the irregularity may be obviated by declaring upon the face of the decree that it is for his benefit, and remanding the cause to the end that he may bring forward his claims by petition, without the trouble and expense of a new suit or protracted litigation. This is in substantial accordance with the practice established

in *Birdsong* v. *Birdsong*, 2 Head, 298, 301, 302. See, also, *Mims* v. *Mims*, 1 Hum., 430, 431; *Rowan* v. *Mercer*, 10 Hum., 361, 364.

So much of the Chancellor's decree as declares the complainant's right to a recovery, and declares that the land conveyed is liable to its satisfaction, will be affirmed; but as the decree allows the amount adjudged in favor of complainant to be credited with any sums already paid on the judgments at law, the cause will be remanded for the purpose of taking an account, and of allowing A. C. Young to become a party, and the other beneficiaries, if necessary.

The costs in this Court will be divided between the parties.

ELIZABETH GARRETSON *v.* M. M. BRIEN, *et als.*

1. ESCHEAT. *Act of* 1850, *c.* 54, *valid.* The lands of an unnaturalized resident, which were sued for by the State as escheated, and the suit dismissed under the third section of the act of 1850, c. 54, by virtue of that act vested in the widow of such resident.
2. EXECUTION SALE. *Dower in equity not subject to.* A dower interest laid off, out of an equitable estate, is not subject to execution at law for the debt of the dowress.
3. LIS PENDENS. *Conveyances pending a suit.* A deed executed pending a suit by parties to the suit, does not affect the title, but the purchaser, though not a party, is bound by the decree.

Elizabeth Garretson *v.* M. M. Brien *et als.*

Cases cited: *Puckett* v. *State*, 1 Sneed, 358; *Combs* v. *Young*, 4 Yer., 218; *Baker* v. *Heiskell*, 1 Cold., 642.

FROM DE KALB.

Chancery Court at Smithville, September Term, 1867, before B. M. TILLMAN, Ch.

R. CANTRELL, Sr., for complainants, cited: *Elrod* v. *Lancaster*, 2 Head., 571; *Ingraham* v. *Smith*, 1 Head., 411; *Peak* v. *Ligon*, 10 Yer., 469; *Estell* v. *Taul*, 2 Yer., 467; *Combs* v. *Young*, 4 Yer., 218; *Birdwell* v. *Cain*, 1 Cold., 301; Act of 1850, c. 54.

SAVAGE, for defendants, cited: 2 Tenn., 334; Meigs, Dig., § 820; 2 Jac. L. D., 314, 318; 4 Kent, 37, 39, 40, 45, 48, 49; 3 Bl. C., 176; 6 Jac. L. D., Seizin; 8 Hum., 537; 1 Hum., 414; 7 Hum., 79; 6 Hum., 444; 1 Story, 57, 58, 61, 108, 298, 411, 413, 414; 2 *Ib.*, 1493; 1 Greenl., § 207; 1 Cold., 19, 23; 2 Head., 628; King's Dig., §§ 75, 91; 3 Yer., 124; Johns. C. R., 46.

NELSON, J., delivered the opinion of the Court.

On or about the 3d of Dec., 1843, Manson M. Brien purchased of Cicero B. Duncan, executor of the last will and testament of Thos. W. Duncan, he having full power and authority under the will to make the sale, four several tracts of land in DeKalb county, described in the pleadings, and containing about five hundred acres. Duncan, the executor, executed to Brien a title bond binding himself to convey when the purchase money should be paid. Brien afterwards sold the land to B.

F. Browning, for whom he, probably, made the purchase, and executed to him a similar title bond. The purchase money was fully paid by Browning to Brien, and by Brien to the executor, and the parties had it in contemplation that a deed should be executed from the executor, directly, to Browning, but this was prevented by the death of Browning, which occurred between the date of his will, 17th of November, 1846, and the time of its probate, 4th of January, 1847. Browning was an unnaturalized foreigner. He died without heirs, but left a widow, Lucinda, who, having dissented from his will, filed a petition for dower, in the Circuit Court of DeKalb, on the 5th of February, 1848, and obtained a decree on the 7th of October, 1848, assigning her as dower, one hundred acres, with the mansion house. The costs of the application for dower, amounting to $47.62½, were adjudged against her, and execution issued therefor on the 22d of November, 1848. No personal property being found, the execution was levied 22d of November, 1848, on the dower tract, which was sold, at public sale, 5th of February, 1849, and purchased by A. M. Savage, at the price of ten dollars. By the direction of Savage, the land was conveyed by E. W. Taylor, successor of the former sheriff, to A. M. Savage and M. M. Brien, by deed, bearing date 18th of August, 1852, and duly registered on the same day. Savage afterwards died and M. M. Brien, on the 22d of October, 1859, executed a deed of gift for his interest in the land, to the children of Savage; which does not appear to have been formally proved and registered, but as to the execution of which there is no controversy.

Elizabeth Garretson *v.* M. M. Brien *et als.*

In the meantime, on the 24th of February, 1865, this bill was filed by Thos. C. Wroe and his wife, Lucinda, formerly Lucinda Browning, against M. M. Brien, A. M. Savage, Cicero B. Duncan, and A. J. Duncan, to enjoin an action of ejectment, which had been brought by Brien and Savage, on the 30th of December, 1854, against J. M. White and others, to recover the dower interest, as well as other lands owned by Browning, at the time of his death. It is charged in the bill that, situated as it was, the dower interest was not the subject of levy and sale, and could not be sold by an execution at law; that the title bond of Browning had been lost or mislaid, or was in possession of Brien; that complainants are entitled to the land under an act of Assembly of this State; that Brien and Savage had fraudulently combined and confederated together, to defeat them of their just rights; had procured the execution of the sheriff's deed, and had brought an action of ejectment for the recovery of the land, the prosecution of which complainants pray may be perpetually enjoined, &c.

To this bill, the defendants pleaded, first, that the one hundred acres had been sold, as aforesaid, at sheriff's sale; and, second, that the remaining four hundred acres had been sold under a decree of the Chancery Court, at the suit and instance of Stephen H. Colmes, and purchased by one Malone; that more than two years had elapsed since the making of said sale, and the time of redemption had expired; and, that complainant had no title to said lands. Complainants filed a replication to said plea, and the defendants afterwards filed separate answers, the details of which it is unnecessary to state

here, as several of the points relied upon were obviated by the agreement set out in the bill of exceptions.

It further appears that S. H. Colmes filed a bill against Thos. C. Wroe and others, and that, on the 27th of March, 1855, a decree was pronounced in said cause, confirming a sale made therein, by the Master, and vesting the title to all of said lands in Thomas Malone, the purchaser, excepting the dower interest of the said Lucinda. By said decree, all the right, title, claim and interest of the heirs and executors of Thomas W. Duncan, deceased, and of Manson M. Brien, in said lands, were divested out of them and vested in Malone, to the extent of the interest purchased by him; and, in the said Lucinda, in fee, and to her sole, separate, and exclusive use, to the extent of the dower tract.

Without detailing intermediate proceedings, it may be stated that this cause was before this court, at a former term, and that a decree was pronounced therein, on the 7th of December, 1856, remanding it to the Chancery Court at Smithville, to the end that proper parties might be made and such proceedings had as might he necessary to the determination of the question, whether the property "of intestate Browning," in the pleadings mentioned, did not escheat to the State.

A bill was, thereupon, filed, by Tim. H. Williams, Attorney General for the fourth circuit, in the name of the State, against all the parties in interest, and claiming that the lands, with the exception of the dower interest, had escheated to the State, and that the title thereto should be divested out of all the other parties. A decree was pronounced in that cause, 23rd of September,

1859, dismissing the bill; from which an appeal was prayed and granted; but the appeal having been abandoned, a final decree was pronounced therein on the 23d of March, 1860, by which the cause was stricken from the docket at the cost of the State.

After the death of Browning, and before the commencement of the suit by Colmes, an act was passed by the General Assembly of this State, on the 10th of January, 1850, c. 54, pp. 162, 163, by which it was declared that when any person should die thereafter, intestate, leaving no heirs at law, capable of inheriting real estate under the laws of Tennessee; but leaving a widow, then, and in that case, the widow shall be entitled in fee simple, to all the real estate of which her husband died, seized and possessed, but subject to the payment of his just debts, in the same way and to the same extent that real estate was then liable. By the second section of said act, it was declared that its provisions should "be extended to and embrace all cases in which persons may have heretofore died intestate, as mentioned in the first section of this act, as well as those who may hereafter die intestate, and for the recovery of such real estate, suits have not been brought, or if brought, have not yet been determined." And it was directed, in section 3, of said act, that "in all cases in which any of the Attorneys General of this State may have brought suit for the recovery of any real or personal estate, which may have been escheated to the State, under the laws of this State," &c., "the said Attorneys General, respectively, are hereby authorized and required to dismiss such suits," at the costs

and expenses of those who, "by the provisions of this act, take such estate."

This act was, incidentally, noticed by this court in the case of *Puckett* v. *The State*, 4 Sneed, 359, 360, and its provisions were declared to apply only to widows who were living at the time of the passage of the act, and not to the heirs of a widow who had died previously; but it was not determined whether the provisions of the first and second sections were subject to constitutional objections. The question, the consideration of which was thus waived, is supposed to arise upon that part of the act of 1827, chap. 64, sec. 1, which declares, among many other things, that "all escheats which shall hereafter accrue in this State, shall be appropriated to the encouragement and support of common schools forever," as well, perhaps, as upon other statutes, and upon a clause in the Constitution of 1834, art. 11, sec. 10, declaring, among other things, that all "property of every description whatever, heretofore, by law, appropriated by the General Assembly of this State, for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund," &c., for the support and encouragement of common schools, &c., and "no law shall be made authorizing said fund, or any part thereof, to be diverted to any other use," &c. But no question has been discussed before us as to the validity of the said act of 1850; and, as it was declared in *Puckett* v. *The State*, 1 Sneed, 358, that "upon the death of the owner of real estate, intestate, without heirs, the title vests, directly, in the State, by operation of law," and not in the Board of Common

School Commissioners; and that, "if the property be adversely held, an action for its recovery can, alone, be maintained in the name of the State;" and, as the suit, brought by the State for the recovery of the lands involved in this litigation, was abandoned, we hold that, under and by virtue of the act of 1850, the title to the lands in the bill mentioned, was absolutely vested in Lucinda Browning, the widow of B. F. Browning—he not having disposed of the lands by his last will and testament, and having, as to them, died intestate. This would now, owing to the lapse of time, be most clearly the result, if any title were asserted, as it is not, in common schools.

The dower, which was allotted to the widow, out of said lands, was not the subject of levy and sale under an execution at law, and no title was vested in Brien and Savage by the sheriff's deed of 19th of August, 1853, in consequence of the dower interest having been struck off to Savage, at the price of ten dollars, at the sheriff's sale, on the 5th of February, 1849.

Where the husband dies, seized and possessed in fee, of lands, and his widow is endowed of them, there can be no question that her estate in dower is a legal estate which may be levied upon and sold for her own debt, under an execution at law, as well as any other legal estate. But where the husband, at the time of his death, has an equitable title, only, to the land, and the widow is endowed of the equitable estate, her dower, in such a case, is an equitable interest only, and can not be reached by execution at law. Ever since the case of *Combs* v. *Young*, 4 Yer., 218, it has been the settled law of this

State, that an equitable interest in land is not subject to execution.

A widow was not dowable, in this State, of an equitable estate, until the common law was changed, by legislative enactment in 1823: *Baker* v. *Heiskell*, 1 Cold., 642. She had no interest, therefore, which an execution at common law could reach, nor was her interest leviable under any of the provisions of the Code: 3026 to 3037.

The deed of 19th September, 1851, from C. B. Duncan executor, to M. M. Brien and A. M. Savage for 500 acres, more or less, is equally unavailing as a defense. In the answer of Brien, sworn to and filed 3d September, 1850, to Colmes' bill, it was admitted, distinctly and explicitly, that he had no legal or equitable title to the land; that Browning had paid the purchase money; that he and Brien had agreed that the title should be made directly from Duncan to Browning, and that this was prevented by Browning's death. Moreover, Brien proposed in that answer to produce Duncan's bond on the hearing, if required, and a letter from Duncan was filed as an answer, in which he admitted that Brien had paid him the purchase money, and stated that he had been willing ever since to make the title. Under these circumstances, if Browning had lived, he could have filed a bill successfully to compel a specific performance of the contract. His widow, standing in his shoes, had the same right, and the decree in Colmes' case, of 27th March, 1861, vesting the title to 400 acres in Malone, and to 100 acres in Lucinda Rowe, was perfectly correct.

The Duncans, as well as Brien, were defendants to

that suit, and bound by the decree. The deed, therefore, of 19th September, 1861, from Duncan to Brien and Savage, was executed *lis pendens*, in violation of the solemn admissions in Brien's answer. Brien and Duncan had actual, and Savage presumptive notice of the suit, and the deed was void. The answers to the twelve searching interrogatories propounded in the bill in this case, are vague and indefinite; the deed, ultimately made by Duncan, was merely a quit claim deed; and it does not appear from the record that the title bond from Brien to Duncan ever was filed; but it is needless to make any comment on the circumstances further than to observe that they place the correctness of the conclusion as to the invalidity of the deed to Brien and Savage, beyond any possible doubt.

In the progress of this cause, the deaths of complainants, Wroe and wife, and of the defendant A. M. Savage, were suggested and admitted, and the case was properly revived on both sides. It appears that, in the action of ejectment, Brien and Savage claim title to 4,000 acres of land granted to A. J. and Isaac Overall, on the 25th July, 1842, and by them conveyed to M. M. Brien by deed, bearing date 11th October, 1844. How much of the 500 acres purchased of Duncan, is embraced in said grant and deed, does not appear? but let the title to the 100 acres be vested in fee in Elizabeth Garritson, and let the defendants be perpetually enjoined from prosecuting any suit at law or in equity for the recovery of the said 500 acres, more or less, or any part thereof.

In all other respects, let the Chancellor's decree be affirmed, save only that the costs of this cause, in this court, and the court below, shall be paid by the defendants, as also the costs of the action of ejectment.

W. A. Moody *v.* Thos. McNeilly & Co.

1. Practice. *Writ of Error.* Where a record is filed with the clerk of the Supreme Court, but no bond to prosecute a writ of error, and no notice to the adverse party, it will not operate as a writ of error.

2. Same. *Bond bad in form and out of time.* An *appeal* bond in such case, filed after the lapse of a year from the final decree, will not give the effect of a writ of error to a filing of the record in time.

3. Same. *Motion to dismiss, when in time.* A motion to dismiss a writ of error, or strike a cause from the docket, made the second term after the filing of the record, and more than three years from the decree, no notice of the fact of filing being shown, is in time.

Case cited: *Cox* v. *Goddard*, 1 Heis., 777.

Motion to strike cause from docket.

D. Campbell for the motion.

Shackleford and Helms, against the motion, cited Code, 3177, 3179, 3180, 3181, 3183: *Montgomery* v. *Buck*, 6 Hum., 416; 2 Cold., 487.

Nicholson, J., delivered the opinion of the Court.

A motion is made to strike this cause from the docket.

W. A. Moody v. Thos. McNeilly & Co.

The final decree was rendered in the Chancery Court at Charlotte, on the 18th of September, 1866. No appeal was prayed for. On the back of the transcript the clerk of this court indorsed, "Filed 11th of March, 1867," but no bond for costs, of that date, appears in the record. To the transcript is attached an appeal bond, signed by complainant and his security, dated February 3, 1868. There is nothing showing that any notice of the filing of the record, for writ of error has ever been given to defendants. On the minutes of this court, at its December Term, 1869, appears this entry: "This day comes Thos. McNeilly and moves the court to strike this cause from the equity docket of December Term, 1867, upon which the same appears without having been brought forward on the docket of December Term, 1868, and December Term, 1869; and the consideration of said motion is continued until the further order of this court." No action was taken on this motion, at the December Term, 1869. According to the indorsement on the transcript by the clerk, the record was filed in time to have entitled the party filing it, to a writ of error; but as he failed to give bond for costs, the cause was not in court by virtue of the indorsement so made by the clerk. When the bond was given on the 3d February, 1868, the time within which the clerk was authorized to grant the writ of error, had elapsed. For that reason the cause was not put into court by the execution of the bond. Nor does it appear that any notice was ever given to defendants, of the filing of the transcript, either before or after

the filing thereof: *Cox* v. *Goddard*, 1 Heis., 777. Although the transcript was indorsed as filed on the 9th of March, 1867; yet it appears that the case was not docketed, either at the December term, 1868, or December, 1869, and was not, in fact, docketed when defendant McNeilly moved to strike it off. We are unable to see that the case has ever been properly on the docket, and we therefore sustain the motion to strike it off.

J. B. KILLEBREW *v.* S. J. MURPHY.

1. JUDICIAL NOTICE. *Of courts being closed.* The courts will take judicial notice when the courts in a particular county were closed—civil law suspended and military power prevailing.[1]
2. EXECUTOR. *Powers of, before probate and qualification.* A person named as executor may, notwithstanding the Code 2201, before qualification, by virtue of his nomination, take possession of his testator's estate and hold it for purposes of protection, preservation and management during the interval that must elapse before probate and qualification.
3. SAME. *Same. Widow. State of war.* A widow appointed executrix, with an interest in the estate, who could not prove the will on account of the prevalence of civil war, held to act in taking care of the estate as trustee and not as executor *de son tort.*
4. SAME. *Same. Same. Compensation to.* In such case, the widow would be entitled to an allowance for her services in taking care of, and managing the estate during the continuance of the war, and until the grant of letters.

[1] *McDonald* v. *Kirby*, *post*.

J. B. Killebrew *v.* S. J. Murphy.

5 SAME. *Same. Money expended to prosecute murderer of husband.* Money expended by a widow, executrix, in such case, during the civil war, while civil law was suspended, to procure the arrest, trial and punishment of the murderer of her husband, held a proper charge against the estate.

6. LIFE TENANT AND REMAINDER. *Improvements not chargeable to remainderman.* The cost of erections on the life estate of the widow in this case, not necessary to the protection, or preservation of the testator's estate, held not to be a charge against the estate of the testator, nor against the remainderman.

7. LEGATEE AND DISTRIBUTEE. *Hire of slaves.* The hire of slaves, until probate of a will, belonged to the distributees. Upon probate of the will, the right to hire from the death of the testator, belonged to the legatee of the slave. If the legatee had possession in the meantime, no one could recover the hire from him.

8. HIRE OF SLAVES. *Before proceeding to sell for debts, goes to distributee, or legatee.* The hire of slaves, accrued before a proceeding to, subject them to payment of debts, must go to distributee, or legatee—not to the creditor, nor to the personal representative for the use of creditors.

Case Cited: *Fay* v. *Reager*, 2 Sneed, 203.
Code construed, 2201, 2284.

FROM MONTGOMERY.

In the Chancery Court at Clarksville, April Term, 1867, before THOS. BARRY, Ch.

J. E. BAILEY, for complainants, insisted that tenant for life can not charge remainderman for improvements: Washb., R. Pro., 95 mar.; Williams on R. Pro., 28 mar.; *Marable* v. *Jordan*, 5 Hum., 417. Nor can he charge the executor: 5 Rich., Eq., (So. Car.,) 401. As to growing crops, cited W'ms on Ex'rs, 600; and said: The point is made for the safety of the administrator, with this observation, that it is worthy of examination whether, in case the personal assets are insufficient to pay debts, the devisee of lands shall take growing

crops. Insisted that, as to compensation, the widow was not entitled, because as tenant of the particular estate, it was her duty to preserve it, and she can not claim compensation.

J. F. HOUSE, for defendant, insisted that the expense of bringing the murderers to justice was a proper charge: Citing *Harrell* v. *Davenport*, 5 Jones' Eq., (N. Car.,) 4. Commented on *Fay* v. *Reager*, 2 Sneed, 200, as to power of executor before probate, &c. Insisted that a devisee takes the growing crop: Citing *Shoffner* v. *Shoffner*, 5 Sneed, 94; 1 W'ms on Ex'rs, 600.

NICHOLSON, C. J., delivered the opinion of the Court.

In June, 1863, Lawson J. Murphy died, from violence, in Montgomery county, having executed his will a few days before his death. He was the owner of a large real and personal estate, leaving his wife, Sylvester J., surviving him. They had no children.

By his will, he gave all of his estate, real and personal, to his wife, during her widowhood. Upon the termination of her widowhood, his real estate was to be divided between Thomas J. Carney and Elizabeth Pride. His slaves, except three, were to be divided in like manner. The three slaves excepted from division, and $5,000, were given absolutely to his wife. He provided for certain charges on the bequests and devisees made to Thos. J. Carney and Elizabeth Pride, which are not material to be noticed. He appointed his wife executrix, and desired Holcott Pride to give her any assistance she might require.

J. B. Killebrew *v.* S. J. Murphy.

After his death, the widow of testatrix remained in possession of all the property, and managed and controlled the same, until after the close of the war, when she renounced as executrix, and complainant was appointed administrator, with the will annexed. Up to that time, the will had not been proven, nor had she qualified as executrix.

Upon his appointment as administrator, complainant filed his bill against her for an account. She answered, submitting a full statement of her management of the estate, and agreeing to an account. The Chancellor ordered an account, and after taking proof, the Clerk and Master made his report.

The questions for our determination arise upon exceptions filed to the report. Complainant filed five exceptions: 1st, To the sum of $550 allowed for attorney's fee, in the prosecution of the supposed murderer of testator. 2nd, To $1,000 to Bowling and Estes, allowed for arresting the supposed murderer. 3rd, To $650 for building house on the land for overseer. 4th, For the compensation of $1,500 yearly, for taking care of the estate. 5th, Because defendant was not charged with the crop growing when her husband died.

Defendant filed one exception to the report: Because she was charged with $1,000 for the hire of negroes.

The Chancellor disallowed all the exceptions of complainant, except the fourth, and that was modified so as to allow $1,000 a year for compensation, instead of $1,500. He allowed the exception of defendant as to the charge of $1,000 for negro hire. With these modifications, the re-

port was confirmed, and a decree made accordingly, from which complainant appeals to this court.

Before we proceed to examine and pass upon the exceptions, it is essential that we settle definitely the character in which defendant held, controlled and managed the estate of her deceased husband. This is necessary, that we may deduce the proper principle by which she is to be held to account.

We have seen that defendant was nominated in the will as executrix, but that the will was not proven until the termination of the war; and we know, judicially, as well as by the proof in the record, that civil law was suspended in Montgomery county; that the courts of justice were closed; and that military authority prevailed, at the date of testator's death, and from that time until the war was terminated. It is clear, therefore, that defendant did not hold and manage the estate as executrix, and that it was impracticable for her to have been invested with the rightful authority of executrix during that period.

At the same time, it is equally clear, that she exercised the same control over the property, and performed, in some respects, the same acts in managing the estate, that she could and would have performed if she had been regularly qualified as executrix. It follows, that she must have acted either as executrix *de son tort*, or as trustee or bailee for those upon whom the title to the estate passed upon the death of her husband, and for those who might be entitled as legatees and devisees, when the will should be proven. It can not be questioned, that, if a stranger had intruded into the estate, and performed the acts per-

formed by her, the law would have held him to be an intermeddler, and liable to the strict accountability of an executor of his own wrong. Williams on Executors, p. 225, says: "If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself an executor of his own wrong." But does it follow, that if a person who is nominated as executor assumes to take charge of the estate before his qualification, he thereby becomes an executor of his own wrong? It is well settled that by the English law, the probate of a will is not the foundation of the executor's title, but it is merely operative as the authenticated evidence of his title. He derives all of his interest from the will itself; and the property of the deceased vests in him from the moment of the testator's death. Hence the probate, when produced, is said to have relation to the time of the testator's death. It was, therefore, held that the executor, before he proved the will in a spiritual court, might do almost all the acts which were incident to his office: 1 Wms. Exrs., 256; 4 Bac. Abr., 63.

It follows, that defendant was not an intermeddler, in taking charge of and managing her husband's estate, unless the law, which we derived from England, has been changed in this particular by statute. By Section 2201 of the Code, it is provided, that "no person shall presume to enter upon the administration of any deceased person's estate, until he has obtained letters of administration, or letters testamentary." In the case of *Fay* v. *Reager*, 2 Sneed, 203, it is said, that "it is well settled under our law, that until after his qualification, an execu-

tor stands upon the same footing with an administrator; and that until he has given bond, and been duly qualified, as required by law, the goods and chattels of the deceased testator remain in custody of the law, and he can do no valid act relating to the administration thereof."

Upon these authorities, it would seem that the law, as laid down in Williams on Executors, and in Bacon's Abridgment, is so far changed, that a person named as executor can not perform any valid act relating to the administration of the goods and chattels of the deceased, before his qualification; and until he has qualified and given bond, and taken out letters testamentary, the goods and chattels remain in the custody of the law. The true meaning of which is, that until the qualification of the executor, the title to the goods and chattels do not so vest in him, as to be subject to be reached by suit or attachment. It follows, that under our law, upon the death of an intestate or testator, the title to the property passes to the distributees and heirs, and there remains until administration is granted, or until the will is proven and the executor qualified; but in the meantime, the property itself is in the custody of the law. Who the custodian is in such cases of intestacy, the law expressly provides. In section 2284 of the Code, it is enacted, that "when a man shall die intestate, leaving a widow, until letters of administration are granted, she may take the personal property into her possession," etc. Although this section, in terms, applies only to persons dying intestate, yet under the authority of *Fay* v. *Reager*, and according to its spirit, we may fairly construe it as applicable to a person dying testate, until the will is proven,

and as, until that time, the property of a testator, like that of an intestate, is in the custody of the law. Or, perhaps more properly, we should say that section 2201 only forbids any person nominated as executor, to enter upon his duties as such before qualification; but that in other respects, the common law applicable to the subject, is unchanged. Hence, that an executor before qualification may, by virtue of his nomination, take possession of the deceased's estate, and hold it for purposes of protection, preservation and management, during the interval that must elapse before probate and qualification. What acts he may do as such temporary custodian, or trustee, or bailee, must depend upon the character and situation of the estate, and the probable time to elapse, in view of all the circumstances, before probate and qualification can legally take place.

It follows, that, under either view of the law, defendant, as widow or as nominated executrix of her deceased husband, remained legally in the custody and management of the estate; and that while her leading duty as such custodian or bailee was the preservation and protection of the estate, yet, that in view of the prevalence of war, the suspension of civil law, and the probable continuance of this state of things, she was not guilty of intermeddling, so as to become liable as an executor *de son tort*, in continuing to keep the property together, in cultivating the lands, in selling crops, and in doing the usual acts of a qualified executor. From the necessity of the case, being rightfully in possession, being the nominated executrix, and having an inchoate right, under the will, to a temporary or conditional interest in the pro-

perty, she would have failed in her duty to the ultimate beneficiaries, if she had abandoned the estate, and failed to do all in her power to preserve and protect it, until civil law should revive and relieve her of the trust.

Her execution of the trust, therefore, must be viewed as that of a trustee, or special bailee, acting in the discharge of rightful authority, and not that of an officious intruder into the estate. If, in the execution of the trust, the proof shows that she acted with integrity and fidelity, accompanied with proper diligence, she has a right to that liberal protection, which a court of equity uniformly extends to faithful trustees. She has a right, if she shows herself to have been faithful and diligent; and that she has, is fully established by the proof; to have her conduct weighed and judged in the light of the obstacles, difficulties, dangers, and exigencies of her situation; and to demand that measure of justice and equity, to which fidelity and diligence, under the peculiar circumstances, entitle her.

Nor is the defendant entitled to a less measure of equitable protection and relief, if the estate in her custody was not all preserved and saved from loss, provided the loss was inevitable and despite her reasonable efforts to protect and preserve it. Nor is she to have a less measure of protective relief, because she had a common interest with the other beneficiaries in remainder, in the preservation and protection of the estate from the destruction which threatened it.

With these general rules for our government, we now proceed to the examination of the several exceptions in issue before us.

J. B. Killebrew v. S. J. Murphy.

The first two exceptions relate to the expenditure of money, for attorney's services, for prosecuting the alleged murderer of defendant's husband, and for services in procuring his arrest. The objection is not to the amonnt of the expenditure, nor that his prosecution was not right and proper, but to any allowance whatever.

We learn from the record, that the husband of defendant was the owner of a large estate, consisting of one thousand five hundred acres of land, about thirty-six slaves, and a large amount of personal property. He came to his death by violence, but under what particular circumstances, is not disclosed in the record. His widow naturally felt it to be her duty, to have the supposed murderer arrested and tried. He had made his escape. There were none of the means provided by law, for his arrest and punishment, within her reach. These had all been suoerseded and suspended, by the prevalence of military authority. In this state of things, she employed two men to go in pursuit and make the arrest. They succeeded, and the supposed murderer was brought to trial before the military authority. She employed an attorney to prosecute. For the services so rendered, in arresting and prosecuting the supposed murderer of her husband, she paid $1,550 out of the assets of the estate.

The question now is, shall she be allowed for this expenditure out of the estate, or shall she account for it out of her legacy of $5,000? Shall the loss of this amount be borne by her, or by the legatees, who are entitled to the property after the termination of her limited estate?

J. B. Killebrew *v.* S. J. Murphy.

It is to be observed, that this is not an application of the trustee to expend trust money for bringing a supposed murderer to trial, but it is an application of the trustee to be relieved of personal liability, after the expenditure had been made. It is conceded that there was no law which specially authorized the defendant to make such an expenditure, but after the expenditure has been made, it is contended that a court of equity can look to all the circumstances, examine the motive for the expenditure, ascertain whether the expenditure was for the personal benefit of the trustee; whether it was intended to advance an end alike beneficial to the beneficiaries and the trustee, and whether the end sought could not have been secured without making the expenditures. We think, in determining an appeal so directly made to the discretion of a court of conscience, these are legitimate inquiries to be considered. The proof shows that the expenditure was made to accomplish a proper object; that it was made without direct authority of law, but not in violation of law, because there was no law which could be appealed to; that the supposed offender could be brought to justice by no other available means; that the expenditure was not made for personal profit or benefit of the defendant; but that it was made in good faith, and for an object which defendant had reason to believe would be approved and sanctioned by all interested in the fund used and in the accomplishment of the object for which it was expended. It is conceded in the argument, that, if the expenditure had been made in a time when civil law was prevailing, the stern rules of that law would for-

bid its allowance. Nor have counsel been able to find any case, occurring under similar circumstances, which can serve as a precedent. This was scarcely to be expected. The case before us is so novel that it must itself become a precedent. We suppose the like has hardly before happened. A man of wealth and standing has died by violence, leaving a widow and no children, with no law in force for the arrest, prosecution and punishment of the offender, the widow being nominated as the executrix, the body of the estate devised ultimately to others; the widow and executrix in the discharge of what she esteems her duty to the public, to the memory of her husband, to the supposed wishes of her husband's legatees and devisees, has expended a small amount of the assets in her hands, and when law is restored, and she asks to be credited with the expenditure made when there was no law, she is met with the objection, that it was the money in expectancy of the legatees and devisees expended; it was used without law, and the loss must be her own. But while no precedent can be found sustaining the allowance referred to, it is equally true that no precedent is found forbidding the allowance. We must, therefore, decide the question by rules of law, which were suspended and in abeyance when the expenditure was made, or we determine it according to the natural rules of right, justice and equity, in view of the surrounding circumstances when the expenditure was made. We feel that our duty can only be discharged by following the dictates of right, justice, and equity, as they are clearly indicated by the peculiar circumstances of the case. If, as

was held in North Carolina, an executor was bound to expend the money of his trustee in defending a slave arrested and tried for felony, though the trial resulted in his conviction and execution: 5 Jones' N. C. Eq. R., 4. If, as laid down in Redfield on Wills, "the amount which an executor may have allowed for general expenses, has always been based upon the consideration of what was reasonable, under all the circumstances:" 2 Redfield, 224; if expenditures can be lawfully made, in erecting monuments to the memory and virtues of deceased testators, which is constantly done—if expenditures like these are allowable, in the sound discretion of the courts, in view of all the circumstances, in times when the laws are in full force, we think that they furnish some light for our guidance in the extraordinary case before us. Under all the circumstances, we can not hold that the defendant should be made responsible for the expenditure; and we affirm the action of the Chancellor in disallowing the first two exceptions of complainant.

The third exception of complainant relates to the allowance of $650 to defendant, for building an overseer's house. If the proof had shown that this expenditure was necessary for the preservation and protection of the estate, it would have been properly allowable. But we are unable to see, from the proof, that such a necessity existed; nor do we understand, that the tenant of a temporary estate has a right to make improvements thereon, at the expense of the remaindermen, unless such expenditure is necessary for the preservation of

the estate. We, therefore, think this exception was well taken by complainant, and reverse the action of the Chancellor thereon.

The fourth exception of complainant relates to the compensation of $1,500 a year, allowed to defendant by the Clerk and Master, for her services in taking care of the property for about two years.

The Chancellor modified the allowance, and reduced it $1,000 a year. Upon examination of the proof, which is full on this point, we find that the weight of the evidence entirely supports the report of the Clerk and Master; nor do we see in the record any ground on which the preponderance of the proof in favor of the allowance of $1,500 a year can be disregarded by us. We know of no other ground upon which to disturb the report, but the proof in the cause.

But it is insisted for complainant, that defendant is entitled to no allowance for her services. It is said she performed the services under no contract, either express or implied. We have already determined, that she held the estate after the death of her husband, as the custodian provided by law and by her designation as executor by her husband's will. Being in possession, as his widow, at his death, and being nominated by him as executrix, it was her duty both to the heirs, in the event the will should never be proven, and to the legatees and devisees, in the event the will should be proven, to continue in possession, and to protect and preserve the property as best she could.

For the execution of this trust, the law implies that she should have a *quantum meruit* compensation for her

services. It can not be said that she was preserving and protecting the property for herself alone. Until the will should be proven, the title was in the heirs and distributees of her husband. She could not know that the will would ever be proved and established. And if it should be, she knew that she only had a limited interest, and that upon its termination, the entire estate of lands and slaves were to pass to the legatees and devisees specified. She saw that her interest in the estate, in either view, was small compared to that of the heirs or devisees and legatees. The proof is overwhelming as to the meritorious character of her claim for compensation. Nor is it any objection to its allowance, that much of the personal property was lost by thefts and robbery, and other unavoidable misfortunes; or that the slaves were impressed by military authority, or absconded of their own volition, or that they were all ultimately lost by the results of the war. The difficulties and troubles only increased the responsibility of the trust, and called for increased efforts to save the property. The proof shows that she did all it was possible for her to do, in the discharge of the trust, and for her services, we are satisfied to reverse the action of the Chancellor, in reducing her compensation, and to confirm the amount reported by the Clerk and Master.

The fifth exception relates to the failure of the Clerk and Master to charge defendant with the crop growing at the death of her husband. We do not understand that this exception is relied on here,[1] nor do we see that

[1] See Mr. Bailey's Brief. *Ante*, p. 547.

it was passed upon by the Chancellor. The exception was not well taken, and is disallowed.

The only exception filed by defendant has relation to the charge made against her of $1,000 for the hire of the negroes. There are several grounds upon which this exception was well taken. Defendant had possession of the slaves, as of all the other property, not in her own wrong, but only as custodian, and therefore was not responsible for hire. The title to the slaves, upon the death of testator, passed to his distributees and not to his executrix. Until the probate of the will, their hire would belong to the distributees. But upon the probate of the will the right to the hire, from the death of the husband, belonged, by the terms of the will, to the defendant. It follows that complainant had no right to hold defendant to account for the hire of the negroes. Nor do we think the creditors of the testator, if they were before the court, could establish any claim to the hire of the negroes, accruing before the administrator with the will annexed, took the steps prescribed by law to subject the slaves to the payment of the debts. Down to that time, the hire of slaves, like the rent of lands, belongs to the distributees and heirs. This exception of defendant having been allowed by the Chancellor, we affirm his action thereon.

With the modifications indicated, the decree of the Chancellor will be affirmed with costs.

Susan J. Meador v. Henry L. Meador *et al.*

SUSAN J. MEADOR *v.* HENRY L. MEADOR, *et al.*

MORTGAGE. *By Deposit of Title Deeds.* A mortgage by parol and deposit of title deeds is not valid in Tennessee.

FROM SMITH.

In Chancery at Carthage, before B. M. TILLMAN, Chancellor.

The bill alleged that the defendant, Joseph Meador was in possession of the deed of W. A. Meador, late husband of complainant, and that he claimed to hold it under a parol mortgage and deposit of the deed. That he had sold the land to a co-defendant, Jones, and made him a deed, and prayed the delivery of the deed deposited, and the cancellation of the other deed as a cloud. That W. A. was dead, and Henry L. Meador, defendant, his heir at law, and defendant Duke, his administrator. The answers set up the deposit as an equitable mortgage, and, by way of cross bill, asks "if no lien exists," a sale of the land and the application of the fund to the payment of the debts of defendant.

The decree below, reciting that it appearing that the deed "was delivered to the said Joseph Meador by the said W. A. Meador, deceased, intending thereby to secure the said Joseph Meador for his liabilities as security, and otherwise, of the said W. A. Meador, deceased;" declared that the delivery of the deed of W. A. Meador to defendant Joseph Meador did not create a lien or mortgage on the land in favor of Joseph Meador, and that complainant was entitled to dower and the residue of the

fund, subject to the payment of all just debts outstanding—it adjudged that the title to the land was "in the heirs of W. A. Meador, deceased, and that the deed from Joseph Meador to his co-defendant, was void, and a cloud upon the title of the heirs at law of W. A. Meador, deceased, and shall be for naught held."

From this decree the defendants appealed.

JAMES W. MCHENRY, for Duke, cited *Russell* v. *Russell*, 1 Bro., 269; 4 Kent, 150, 151, 168; Coote, 222; 1 Hil. on Mort., 3rd ed., 650, 662; 2 Sto. Eq. Jur., § 1020; 2 Greenl. Cruise, 85; *Gilliam* v. *Esselman*, 5 Sneed, 88; *Barfield* v. *Cole*, 4 Sneed, 465; *Arendale* v. *Morgan*, 5 Sneed, 703.

JOHN W. HEAD, for respondents, said: In England, an equitable mortgage may be created by the deposit of title deeds, and is not within the statute of frauds: *Russell* v. *Russell*, 1 Bro., 269; *Birch* v. *Ellames*, 2 Anst., 427; 4 Kent, 150; Willard's Eq. Jur., 440; *Ex-parte Whitbread*, 19 Ves., 209; 2 East R., 486; 2 Ves. & Beames, 79; 12 Price, 597; 2 Mylne & K., 417, 419. This doctrine has been repeatedly recognized in New York, though they have Registry laws similar to ours: *Jackson* v. *Parkhurst*, 4 Wend., 376; 1 Johns. Cas., 114; 2 J. C. R., 603; 2 Sandf. Ch., 9; Willard's Eq. Jur., 440. Some of the other States have recognized the same doctrine, and it has been recognized by the Supreme Court of the United States in *Mandeville* v. *Welch*, 5 Wheat, 284. The question has not been directly decided in Tennessee. The cases cited in 1 Heis. Dig., do not sustain the doctrine there laid down. *Barfield* v. *Cole*, 4 Sneed, 465, draws the distinction between a pledge and

a mortgage, and decides that a mortgage, under the act of 1831, does not take effect as to creditors until registered. *Gilliam* v. *Esselman*, 5 Sneed, 86, does not raise the question, and the language of McKinney, J., is a dictum. If it were a decision, the Judge is referring to legal, not equitable mortgages. The case does not decide that equitable liens can not exist without writing. In *Arendale* v. *Morgan*, 5 Sneed, 703, it was held that a verbal pledge of a slave was good, and the case, so far as it holds that the act of 1831 has no application to a pledge, is an authority for the defendant's position. The vendor's lien is implied without any writing to create it, and the lien of a purchaser of land by parol is a stronger instance: *Anthony* v. *Smith*, 9 Hum., 508; 7 Yer., 168, *Ib.*, 9, 13; 1 Yer., 97, 100; 1 Hum., 325; 5 Hum., 129. The case here arises between the original parties or persons in their shoes, not with creditors or purchasers.

Turney, J., delivered the opinion of the Court.

The delivery by a debtor to his creditor, of a deed made to the debtor for land, upon the agreement and understanding between the debtor and creditor that the creditor is to hold the deed as security or indemnity for debts due from the debtor or for which the creditor is bound as surety for the debtor, creates no lien or mortgage, legal or equitable, upon the land embraced in the deed.

A contrary holding would be a judicial repeal of our statutes of frauds and perjuries, making void, sales not evidenced by writing, of lands, tenements or hereditaments.

Affirm the decree, and remand the cause for the assignment of dower and account for rents and profits.

Benj. F. Smith *v.* Thos. J. Slaughter *et als.*

Benj. F. Smith *v.* Thos. J. Slaughter *et als.*

1. Administrator. *Stayor of Judgment against. Suggestion of Insolvency.* A bill will not lie, by an executor who has wasted assets to enjoin a suit or judgment in favor of a stayor, who, at his instance, has stayed and paid a judgment against the executor for a debt of the estate, though the estate has become, and been suggested to be, insolvent.
2. Same. *Same. Devastavit.* The failure of an executor to pay a debt when the estate is solvent, and his allowing judgment to be taken and stay to be entered, is *prima facie* evidence of waste if the estate subsequently became insolvent.

FROM SMITH.

In the Chancery Court at Carthage, June Term, 1868, before B. M. Tillman, Ch.

Ward, DeWitt & McHenry, for complainants.

S. M. & J. A. Fite, for respondents.

Turney, J., delivered the opinion of the Court.

There is no equity in the bill.

The facts, as shown by the bill, are: Levi J. Squires, after having made his will, died in March, 1860. At the April Term, 1860, of the County Court for Smith county, complainant qualified as executor of the will. On the 28th of June, 1861, Samuel Allison, Executor of the will of G. L. House, obtained a judgment against complainant as executor, before a Justice of the Peace, for the sum of two hundred and seventy-eight dollars and

ninety-eight cents, besides costs, which was stayed by defendant, Thomas J. Slaughter. At the time of the rendition of the judgment, the assets of the estate of Squires were sufficient to pay all its liabilities; but subsequently, by the casualties of war, the estate became insolvent. In March, 1866, complainant filed his bill in the County Court, suggesting and alleging such insolvency, praying to sell land, &c.

From the judgment before the magistrate an execution issued against Slaughter, which he, on the 24th of March, 1866, transferred to the Circuit Court by writs of *certiorari* and *supersedeas*. His petition was dismissed and judgment rendered there against him and his sureties, which he paid.

On the 2d of August, 1866, he obtained judgment by motion before a Justice of the Peace against complainant, who filed his petition for writs of *certiorari* and *supersedeas*, which is still pending in the Circuit Court. Complainant then filed this bill to enjoin the proceeding at law and to be relieved from liability on account of the Allison judgment, insisting that Slaughter must take his *pro rata*, under the decree of the County Court, settling the insolvent estate of Squires.

These facts prove complainant to have been guilty of waste in the administration of the estate of his testator; it was his duty to have paid the debt while the estate was solvent. No excuse is given for not doing so; by his laches he has made himself personally responsible to Slaughter.

The decree of the Chancellor dismissing his bill is affirmed.

DAVID C. SAUNDERS *v.* SMITH GREGORY'S HEIRS.

1. DECREE. *When Final.* A party holding a fund for distribution among numerous parties, filed a bill to ascertain the parties entitled to the fund, and to have the direction of the court as to the distribution. The moneys were in part loaned *pendente lite* by order of the court. At the February Term, 1861, direction was given to get in the fund by the next term, and to let the heirs of Smith Gregory have what they may choose to receive, on bond to refund, if required. From this time until August, 1865, it does not appear that any term of the court was held. In August, 1865, a decree was had, upon a report of the Clerk and Master to the February Term, 1861, for amount in hands of complainant, $1,023.45, and interest to date, $276.77, which he was directed to pay into the Master's office within three months, or execution to issue. The decree further directed a report as to the remainder of the fund collected and uncollected. *Held*, to be a final decree on which a bill of review would lie as to the fund and interest decreed to be paid.

Cases cited: *Helms* v. *Mynatt*, 6 Cold., 220; *Gill* v. *Creed*, 3 Cold., 297, 298; *Delap* v. *Hunter*, 1 Sneed, 104; *Allen* v. *Barksdale*, 1 Head, 240, 241; *Overton* v. *Bigelow*, 10 Yer., 52, 53; *Berryhill* v. *McKee*, 3 Yer., 159; *Meek* v. *Mathes*, 1 Heis., 537; *Abbott* v. *Fagg*, 1 Heis., 748; *Harrison* v. *Farnsworth*, *Ibid*, 753.

2. BILL OF REVIEW. *Error of Law.* A bill of review in such case, because interest was charged, when, by the decree of February, 1861, he was in effect precluded from loaning, held good without leave, it being error of law.

3. SAME. *New Matter. Waiver.* A bill of review, alleging that the fund in complainant's hand had been received in Tennessee money, and other funds, which had become depreciated since received, not being demurred to for want of leave to file it; held good, and that want of leave was waived.

4. DECREE. *When Final.* The bill of review being dismissed on demurrer, and a decree like that of August, 1865, being entered, the court below refused to allow an appeal. *Held*, that a writ of error would lie.

5. SAME. *Inconsistent.* The decree of August, 1865, directing the payment of interest on a fund which the decree of 1861 made it necessary for the party to retain, held inconsistent with the former decree, and so, erroneous.

David C. Saunders *v.* Smith Gregory's Heirs.

6, ORDER TO PAY OUT FUND. *Interest.* A party directed to let a particular person have a fund, can not loan such fund without a violation of the order and of his duty, and can not be charged with interest for keeping the fund.

7. DECREE. *Power of Court over.* A Chancellor has no power after a decree, at a subsequent term to reverse it, and if he does so, it is error of law, for which a bill of review will lie.

8. BILL OF REVIEW. *Answer. May contest what.* An answer to a bill of review can not go behind the decree attached, to again put in issue matters which were in issue before the decree.

9. TRUSTEE. *Fund Depreciating; where kept.* A fiduciary holding a fund which he alleges he collected in currency which has depreciated on his hands, showing that he has kept the identical moneys separate from his own funds, may discharge his liability by delivering the same, without interest.

10. SAME. *Same; where not kept.* If he has not kept the identical fund, then he will be charged with the nominal sums collected, without allowance for depreciation, and interest from the time he ought to have paid the moneys or to have tendered them into court, and not for such time as he was bound by orders of court to have the money in hand, or was prevented by war from loaning.

FROM SMITH.

Chancery Court at Carthage. The decree of February, 1865, was rendered by J. O. SHACKELFORD, Chancellor, and the orders of February, 1866, by THOMAS BARRY, Chancellor.

S. M. FITE and W. H. DEWITT, for complainants, cited 2 Cold., 38, and *Lowry* v. *Naff*, 4 Cold., 370, as to the jurisdiction of the original bill; and 9 Hum., 525, on the bill of review. On the refusal of the appeal, *Gill* v. *Creed*, 3 Cold., 295. On the effect of the answer to the bill of review as evidence, *Hart* v. *Ten Eyck*, 2 Johns., Ch., 61; *Clements* v. *Moore*, 6 Wallace, 299.

J. B. LUSTER and J. J. TURNER, for defendants, insisted that bill of review lay only for error of fact or

law, apparent on the record: Story's Eq. Pl., §§ 404, 407; 3 Sneed, 397; 1 Head, 460. That this bill was for new matter and without leave: 1 Head, 460; 9 Hum., 524; 4 Hay., 189. That a decree must be performed before bill of review. That it only lies after final decree as the court may vary or rescind interlocutory decrees: Story's Eq. Pl., 406; *Bledsoe* v. *Carr*, 10 Yer., 55, 58. On a bill of interpleader, party must bring money into court: 2 Story's Eq. Jur., 809, *et seq.;* Story's Eq. Pl., 291, 296; *McEwen* v. *Troost*, 1 Sneed, 186, 189; and show that he is ignorant of the rights of the defendants: *Shaw* v. *Coster*, 8 Paige, 339; *Bedell* v. *Hoffman*, 2 Paige, 199; Costs of Bill of Interpleader, 8 Paige, 339; *Aymer* v. *Gault*, 2 Paige, 284; *Ib.*, 199, 209. Appeal or writ of error from decree on bill of review does not bring up original cause. Application to amend too late after order entered to dismiss the bill of review: *Crowder* v. *Turney*, 3 Cold., 551.

The portion of the decree of the Supreme Court affecting the right of the complainant, in the event he had not retained the identical fund, is as follows: "If the complainant does not show that he has the identical fund on hand, he will pay the amount of the decree into court, in legal currency, with interest from the decree in August, 1865."

NELSON, J., delivered the opinion of the Court.

William J. Cleveland and others, filed their bill against Wiley Kemp and others, in the County Court of Smith county, for the sale, in lieu of partition, of the lands which had descended to the very numerous

children and grand-children of William Cleveland, deceased; in .which they prayed, among other things, that the proceeds of sale, when collected, should be distributed among those entitled, according to their respective interests, as set forth in the petition. A sale of the land, in parcels and on credit, was made under the authority of the court; and in the decree of confirmation, pronounced on the 5th of May, 1857, it was, among other things, directed that "the Clerk distribute the proceeds of sale, when collected, according to the prayer of the bill, excluding the share of Joseph Cleveland, deceased, who had received advancements to an amount larger than one-seventeenth of the proceeds of sales." The complainant, in this case, who was the Clerk of the County Court, filed this bill, which has been styled a bill of interpleader, against some thirty-six persons, who are named, and the children of some of the deceased children, whose names are unknown; the children of the said William Cleveland being seventeen in number, and the names and number of several of the grand-children being omitted. The bill of interpleader specifies various persons, among whom there are conflicting claims to the fund in complainant's hands, alleges that he has already paid out more, perhaps, than was prudent, and prays that the parties be required to interplead so that their respective rights may be ascertained, and that he may be directed and protected by a decree of the court.

To this bill various answers were filed by parties who claim the fund, or the larger part thereof. In the progress of the cause, the complainant was directed

in a decree pronounced at February Term, 1860, "to loan out the funds in his hands until the second Monday in August next," thereafter; and, at the August Term, 1860, he was directed "to loan out the funds in his hands, taking notes, with good security, payable at least three days previous to the next Term." At the February Term, 1861, it was "decreed by the court that complainant have the funds in his hands ready at the next term for distribution; that he collect all the rest, if practicable, including the money loaned out by him, with interest thereon." Said decree further directs as follows, viz: "The complainant will let the heirs of Smith Gregory, or their assigns, who, it appears, have not received any of the proceeds of the sale of the land of Wm. Cleveland, deceased, [have as much] as they may choose to receive, upon their giving bond and security to refund, if the court, upon final decree, should so order."

No further steps appear to have been taken in the cause until August Term, 1865; nor does it appear, from the record, that any term of the Chancery Court at Carthage was held in the intermediate period, which was during the time of the late civil war. On the 22d of August, 1865, a decree was pronounced in the cause, in which it is stated that it was heard "in the presence of solicitors on both sides," upon the report of the Clerk and Master made at the February Term, 1861, showing that there was in complainant's hands, on the 12th of February, 1861, $1,023.45; that the interest thereon, from the 12th of February, 1861, to the date of the decree, was $276.77, making an ag-

gregate of thirteen hundred dollars, which amount the complainant was directed to pay into the Master's office within three months, and, if not paid, it was directed that execution should issue. It was further ordered that the Master should, at the next term, report the condition of the balance of the fund, collected and not collected, meaning a judgment against J. B. Gregory and others for $289.79, and a balance due on L. C. Winkler's note of $210, which, together with the said sum of $1,023.45, made an aggregate of $1,523.22 belonging to the estate, and not disbursed, as shown in the Master's said report, of 12th February, 1861.

On the 22d of November, 1865, the complainant filed a bill of review, in which he alleges that the decree against him for the interest from the 12th of February, 1861, to the 22d of August, 1865, is erroneous, in consequence of the directions given to him in the decree pronounced at February Term, 1861. He alleges, further, that the fund collected by him was in notes on the Bank of Tennessee, and other specified banks, which have greatly depreciated in value, although nearly at par when received.

The "joint demurrer, plea and answer of Curtis and William Gregory to the bill of review," was filed on the 17th of February, 1866; and on the 21st day of the same month a decree was pronounced, in which it is declared that the allegations of equity in the bill are fully met and denied; that there is no equity whatever in complainant's bill; that no good ground is shown for a bill of review, and that the demurrer thereto is well taken, &c. Thereupon, a decree was pro-

nounced against complainant and his securities in the injunction bond, for $1,330, and costs of suit; and the order to the Clerk and Master, made at the previous term, requiring him to report as to the condition of the balance of the fund, was revived. A bill of exceptions, in which all the pleadings and proofs in the County and Chancery courts are set out, was tendered, in behalf of complainants, and signed by the Chancellor. It appears from the bill of exceptions that, on the 22d of February, 1866, the complainant moved the court for leave to amend his bill of review by filing an amended bill, which is exhibited as part of the bill of exceptions, but that this motion was refused; and to the action of the court in refusing, as well as to the decree of the court, complainant excepted, and prayed an appeal to this court, which, as the bill of exceptions states, was granted "upon his giving bond and good security, as required by law, on or before the April rules." A memorandum below the bill of exceptions, signed by the Chancellor, and dated the 22d of February, 1866, states that, "upon reconsideration and re-hearing," he refuses to grant an appeal, in this case, because the decree from which an appeal is prayed is not final; and a transcript of the record was duly filed in this court, as a writ of error, on the 7th of January, 1867.

In the joint demurrer, plea and answer, five causes of demurrer are assigned; 1st, That the decree sought to be reviewed is interlocutory, not final; 2d, That, as the cause was still pending, the relief sought could be obtained, more appropriately without any bill of review; 3d, That there is no error of law, or fact, apparent on

the face of the decree; 4th, That the money should have been paid into the office at the time of filing the bill; 5th, That, as the decree shows that there are other effects in complainant's hands beside the $1,023.43, relief, as to the interest, could have been afforded without such a proceeding. The plea and answer alleges that complainant did not have one dollar of the fund on hand when he filed his bill of interpleader; that he has caused unnecessary and expensive litigation; that the decree was fairly obtained, after full discussion by counsel; that the claim of respondents, to ten out of sixteen shares of the estate, was fully set forth in the answer to the original proceedings in the County Court; that the report, in the Chancery Court, made at February Term, 1861, was not excepted to; that but two shares were, in reality, contested, and these had been paid before filing the bill of interpleader; that complainant, before filing his bill, had paid seven other shares, but had paid nothing to respondents; that complainants had, or might have, collected the money eighteen months before filing the bill; that, in several other particulars, which are specified, the complainant had failed to discharge his duty; that he might, and should, have loaned out the money; that he had promised to pay interest; that he had not kept on hand the identical fund collected; and that, for various causes, he should be held to account for interest from April and October, 1868, and not from February, 1861.

No proof was taken in support of the plea and answer.

The practice, as to bills of review, has so often been

considered by this Court, in reported cases, that it is unnecessary to cite, or refer to, them at length. In the case under consideration, however, an attempt is made to join the demurrer, plea, and answer, to the bill of review, as one defense. There is no doubt that a defendant may demur to one part of a bill, plead to another, answer to another, and disclaim as to another: Story's Eq. Pl., §§ 437, 439, 442. Different grounds of defense may be applicable to different parts of a bill; but it is said by Mr. Justice Story, that "care must be taken that each of these modes of defense is actually applied to different and distinct parts of the bill, and that, as applied, each is consistent with the other, so that one does not overrule the other. Thus, for example, if there is a demurrer to the whole bill, an answer to a part thereof, is inconsistent, and the demurrer will be overruled. For the same reason, if there is a demurrer to a part of a bill, there can not be a plea, or answer, to the same part, without overruling the demurrer:" Story's Eq. Pl., § 442; *Ibid*, §§ 462, 465. Again: it is laid down, as a rule of equity pleading, that "if a demurrer be too general, that is, if it covers or applies to the whole bill, when it is good to part only; or if it is a demurrer to a part of a bill only, but yet is not good to the full extent which it covers, but is so to a part only, it will be overruled; for, it is a general rule, that a demurrer (it is otherwise as to a plea) can not be good as to a part which it covers, and bad as to the rest, and, therefore, it must stand, or fall, altogether. So, if a demurrer does not cover so much of the bill as it might by law have extended to, it has been held to be bad.

But a demurrer may be put in and several causes assigned; and, if one cause is good to the whole extent of the demurrer, and another is bad, the demurrer will be sustained; for, if both were bad, the defendant may, *ore tenus*, assign new causes of demurrer at the argument to matters of substance, although not to matters of form; so that any good cause existing of record, or otherwise assigned, will do:" Story's Eq. Pl., § 443.

In this case, it is not easy to distinguish what is relied upon by way of plea from the other matters stated in the answer, but it is clear that the demurrer and the answer were, each, intended to extend, and do extend, to the entire bill of review. Some of the causes of demurrer extend to the original bill of interpleader, and were waived by the answers thereto. Two of the causes are entitled, however, to consideration: 1st. Was the decree final in such a sense as that a bill of review can be maintained? What is a final decree, has been frequently considered: See *Helms* v. *Mynatt*, 6 Cold., 220; *Gill* v. *Creed*, 3 Cold., 297, 298; *Delap* v. *Hunter*, 1 Sneed, 104; *Allen* v. *Barksdale*, 1 Head, 240, 241; *Overton* v. *Bigelow*, 10 Yer., 52, 53; *Berryhill* v. *McKee*, 3 Yer., 159; *Meek* v. *Mathes*, 1 Heis., 537; *Abbott* v. *Fagg*, 1 Heis., 748; *Harrison* v. *Farnsworth*, *Ibid*, 753.

Within the spirit and meaning of most of these cases, we hold that the decree, of 2nd of August, 1865, against complainant, for thirteen hundred dollars, and awarding execution, was a final decree in such a sense as that, with or without leave from the Chancellor, it could be brought here by appeal or writ of error. No

further action was taken, or intended to be taken, in regard to the sum of money adjudged. No account was ordered, or intended to be ordered, in reference to it. The account directed has relation alone to two separate and independent items. Where the general principles are settled upon which an account is to be taken, and the taking of the account is necessary to the ascertainment of the final liability, the appeal, or writ of error, can not be prosecuted as a matter of right; and in such a case, leave to prosecute the appeal, before the taking of the account, is necessary. But where the account ordered is entirely independent of the decree for a sum certain, the appeal may be prosecuted either before or after the final decree adjudicating every question in the cause, and this as a matter of right: See Story's Eq. Pl., § 408, *a*.

The decree pronounced at August Term, 1865, was erroneous upon its face, as being contrary to the decree pronounced in the same cause, and between the same parties, at the February Term, 1861. The decree last mentioned had directed the complainant to have the fund in his hands ready, at the next Term, for distribution; and had directed payment to be made to the heirs of Smith Gregory, on their executing a bond.

The complainant could not, without a direct violation of this order, have loaned out the fund. It was his duty to obey the mandate of the court, and its order operated beyond the term succeeding the February Term, 1861. How could complainant know when Smith Gregory's heirs would apply for the money? If they had applied to him, at any time between February, 1861

and August, 1865, he would have acted in direct disobedience to the unrevoked decree of the court if he had refused payment and would have rendered himself liable, in some form, to just censure or punishment. The two decrees are utterly inconsistent with each other. In its legal effect, the decree of August, 1865, annuls the decree of February, 1861; and, as the Chancellor had no power to reverse his own decree, or a decree pronounced in the same court and in the same cause at a previous term, we hold that this was error of law apparent on the face of the decree itself, for which a bill of review would lie, without leave; and that his Honor, the Chancellor, erred in dismissing the bill of review: See *Burson* v. *Dosser*, 1 Heis., 754, as to error of law apparent on the face of the decree; and 1 Story's Eq. Pl., § 407, and n. 1, referring to *Whiting* v. *Bank United States*, 13 Peters, 13, 14. It was also error in the Chancellor, first to grant, and then to refuse the repeal; and the case was properly brought here by writ of error.

3d. As the writ of error brings up the entire cause, it is unnecessary to consider the effect of the answer as overruling the demurrer, or that part of the bill of review which seeks to make an issue as to the kind of funds received by the complainant.

This was new matter which could not be properly introduced into the bill, without leave; and had this been assigned as one of the causes of demurrer to the bill of review, it would perhaps, have been sustained.

Although the demurrer, plea and answer, may be joined, the more correct practice, in the case of a pure bill of review, would be, to demur to the bill: Story's

Eq. Pl., §§ 634, 638. And while an answer, in some cases, may be proper to a bill of review, it can not, as seems to be the object in this case, go back behind the decree, and again put in issue matters which were in issue before the decree was pronounced.

4th. Without considering various other questions which have been discussed before us, and without extending this opinion by a protracted statement of the reasons which have led to the result at which we have arrived, let it suffice to declare that the substantial justice of this case will be reached by reversing the decree of the Chancellor on the bill of review, and by remanding the cause for the execution of the decree of February, 1861; and limiting the further investigation in the court below to but three inquiries. Let it be ascertained, under the direction of the Chancellor, whether the complainant collected the amount for which said decree was rendered in current bank notes, and whether he has, at all times, kept said funds entirely separate and distinct from his own moneys; and if he has on hand, the identical fund received by him, let him pay said notes into court in satisfaction of the decree. We give this direction in accordance with the rule stated in Edw. on Receivers, 2d ed., 592. If the complainant does not show that he has the identical fund on hand, let him pay the same into court without interest from the date of the decree in February, 1861, to that of the decree in August, 1865, but with interest from August, 1865. He is exonerated from the payment of interest in consequence of the directions contained in the decree of February, 1861, and because of the state of war existing during the in-

terval; but let him be charged with interest from August, 1865, because he could then have brought, or offered to bring, the fund into court. The Chancellor will ascertain and declare who is entitled to the fund, but will not hear proof as to any other matter in the cause except the judgment against J. B. Gregory and others, for $289.79, and the balance due on L. C. Winkler's note; as to which, if not embraced in the said sum of $1,023.43, he will hear proof, and he will make all necessary orders and decrees for the proper distribution of the fund. The costs in this court, and the costs of the bill of review, in the court below, will be paid by the defendants who filed the joint demurrer, plea, and answer. All other costs of this cause, will be paid out of the fund; but the fees paid, or agreed to be paid by complainant to his counsel, for their services in this case, will not be considered as a charge upon the fund, but must be accounted for by the complainant personally.

Let the decrees of August, 1865, and February, 1866, be reversed; and let the cause be remanded for the execution of the decree of February, 1861, and the purposes above directed.

Thomas Stewart and Wife *v.* Samuel R. Glenn *et als.*

THOMAS STEWART AND WIFE, MARY, *v.* SAMUEL R. GLENN *et als.*

1. COUNTY COURT. *Jurisdiction.* A petition lies in the County Court against an administrator and his sureties, under Code 2312, 2313, to compel payment of a distributive share.
2. PAYMENT. *Of distributive share to County Court Clerk.* A payment of a distributive share to the Clerk of the County Court is not a good payment.
3. HUSBAND AND WIFE. *Debts and distributive share. Set-off.* A note of a husband for property bought at an administrator's sale is not a proper set-off against a distributive share of the wife.
4. COUNTY COURT. *Petition in. Parties.* A proceeding in the County Court to recover a distributive share must make all the distributees parties.
5. PRACTICE IN SUPREME COURT. *Remanding to make parties.* The Supreme Court will remand a cause to make necessary parties where the parties before the Court have a meritorious cause of action.

Code construed: 2312, 2313.

FROM WHITE.

County Court, August Term, 1866, dismissed the petition, from which the petitioners appealed to the Supreme Court.

S. H. COLMS, for appellants, insisted that the debt of the husband could not be set-off against the distributive share of the wife, and cited Code 2483.

E. L. GARDENHIRE, for Glenn, insisted on the want of parties, and that the County Court had no jurisdiction, citing *Bowers* v. *Lester*, 2 Heis., 456.

Thomas Stewart and Wife *v.* Samuel R. Glenn *et als.*

FREEMAN, J., delivered the opinion of the Court.

This is a petition against Samuel R. Glenn and his sureties, on his bond as administrator, filed in the County Court of White county, under sections 2312, 2313 of the Code, to compel payment of a distributive share of the estate of W. J. Glenn, dec'd, the said Mary Stewart being one of his distributees.

It appears from the petition and answer, that defendant, Samuel R. Glenn, had been appointed administrator on the 3rd day of June, 1861; that he had made a settlement of his accounts as administrator on the 3rd day of April, 1863, by which he showed in his hands, as administrator, the sum of $600.65; and that complainants, in right of the said Mary, was entitled to one-sixth of said sum.

The answer admits all these allegations, but insists that he had offered to settle, or sent the parties word that he would settle, provided they would take in a note for property bought at the sale by Thos. Stewart, of $25. It also claims that Stewart asserted a debt against the estate for attention and services rendered his intestate, of $81, which he proposed to settle, but that no settlement was ever had; that Stewart had since sued for said amount, and at January Term of the Circuit Court, 1866, had recovered a judgment for $100.97, and that he had been compelled to pay $20 attorney's fees in defending said suit. He also claims that there was a mistake of $18 against himself in the settlement. He therefore insists that he has not properly in his hands the sum of $600.65, as charged. He closes by insisting that he had deposited

the $25 note with the Clerk of the County Court, and the balance then supposed to be due complainants in the office of the County Court Clerk, in such funds as could be collected at the time, and that this is a payment to complainants. He also objects to the petition for want of proper parties.

The County Court dismissed this petition, for what cause we can not see from the decree, and complainants appealed.

In this we think there was error, as it clearly appears that complainants are entitled to a distributive share, that the administration has been granted more than two years, and that there is a fund to be distributed from the settlement made by the administrator, and from the whole case that the assets of the estate are more than sufficient to pay debts, charges, etc., on the same.

There is nothing in the claim that the $25 note should be allowed as a credit on the share of the wife. This was a debt of the husband's, not the wife. She, as a married woman, could not have contracted any legal liability which could have been enforced against her. The administrator should collect this sum from the husband.

The payment into the hands of the County Court Clerk could amount to nothing as a change of liability for the distributive share. It was the duty of the administrator to pay over the distributive shares to the parties entitled, immediately after his settlement: Code 2311.

As to the judgment subsequently recovered against the administrator, he will, on taking the account, be entitled to a credit for the amount, if he presents vouchers showing he has paid it.

George W. Catron, Adm'r, *v.* Wm. A. Cross *et als.*

We think, however, that the proper parties are not before the court in this case.

The Code, sec. 2314, provides: "The proceedings under such application, shall be conducted as other equitable actions." In taking the account in order to ascertain the amount due to complainants under this requirement, we think the other distributees were necessary parties.

As we can see complainants have a clear right in this case, we reverse the decree of the County Court, and remand the cause, with directions to make the other distributees parties, and to take the account as between the administrator and distributees, in accordance with the views expressed in this opinion.

The costs of this court will be paid by the defendants.

GEO. W. CATRON, *in his own right and as Administrator of* JNO. S. ROWLES, dec'd, *v.* WM. A. CROSS *et als.*

EQUITABLE SET-OFF. *Against assignee.* A debt due from the assignor of a judgment to the defendant in the judgment, can not be set off by bill in equity against a *bona fide* holder of the judgment, without notice. It is otherwise at law, but equity will not actively interfere to grant relief.

Cases cited: *Gatewood* v. *Denton*, 3 Head, 382; *Brazelton* v. *Brooks*, 2 Head, 194; *Edminson* v. *Baxter*, 4 Hay., 112; 1 Sneed, 339.

FROM SMITH.

Chancery Court at Carthage, October Term, 1867. B. M. TILLMAN, Ch., pronounced a decree granting relief,

but not to the full extent prayed, from which both parties appealed.

DeWitt & McHenry, for complainants, cited, on jurisdiction, *Lowry* v. *Naff*, 4 Cold., 370. On equitable set-off, *Brazelton* v. *Brooks*, 2 Head, 194; *Lindsay* v. *Jackson*, 2 Paige, 581; *Gay* v. *Gay*, 10 Paige, 369; *Williams* v. *Helm*, 1 Dev. Eq., 151; *Richardson* v. *Parker*, 2 Swan, 529. As against assignee: 4 Conn., 297; 1 Monroe, 191; 6 Dana, 305; 8 Ala., 206. That the parties need not be identical: *Simson* v. *Hart*, 14 Johns., 62; Waterman on Set-off, § 334, *et seq.* That the statute gives the remedy: *Gatewood* v. *Denton*, 3 Head, 380. Also cited *Edmonson* v. *Baxter*, 4 Hay., 112; Cooper's ed., 301, and authorities there cited.

Freeman, J., delivered the opinion of the Court.

This bill is filed by complainant in his own right, and as administrator, etc., of John S. Rowles, dec'd, seeking to enforce an equitable set-off.

The case made in the record, shows that on the 22d day of January, 1862, Richard C. Nolen recovered a judgment before a Justice of the Peace for Smith county, for $487.35, against Catron, John S. Rowles, (the intestate of Geo. W. Catron,) and W. S. Bell, which was stayed by one Geo. G. Dillard. Bowles died in September, 1862, and Catron was appointed his administrator.

About the 10th of September, 1866, Nolen assigned and transferred this judgment to defendant Cross, as he alleges in his answer, in part payment for a house and lot in the town of Dixon Springs, Smith county; and on the 24th of September, 1866, a notice of this assigument

was given to G. W. Catron, the administrator of Rowles, and also one of the defendants in the judgment. An execution was issued on this judgment, and thereupon Catron filed this bill, enjoining the officer from proceeding under said execution, and claiming that the assignment of the judgment by Nolen to Cross was fraudulent, and intended to hinder and delay creditors of Nolen in the collection of their debts, and that Nolen was insolvent, and claiming a considerable indebtedness to him from said Nolen, and insisting that the amount so due him should be set-off against said judgment so assigned to Cross. The allegation of the assignment being fraudulent, is not made out in proof.

The simple question presented is, as to whether the debts due from Catron, one of the defendants to the judgment assigned, can be enforced against the assignee of the judgment, who took it *bona fide,* and for valuable consideration, alone on the ground that the assignor of the judgment was insolvent at the time of the assignment. We do not think this can be done. By our law, a judgment may be assigned, and the title thereto perfected in the assignee, by notice to the judgment debtor of the fact of such assignment: *Clodfelter* v. *Cox,* 1 Sneed, 339.

When thus transferred, and title perfected in the assignee, it is true he stands in the shoes of his assignor, and takes the chose in action, subject to all equities existing against it in the hands of his assignor. But is a simple debt against the assignor of the judgment an equity against the judgment, or one that has attached to it before assignment? We think not. It must be some defeuse

against the claim itself; not a right of action on an independent demand, as that the judgment had been paid, or that the judgment was void or inoperative for any cause.

The equities here intended are not all the equities which may exist between the parties, arising from other transactions, but all the equities attaching to the particular judgment assigned; and such may be asserted as against the assignee: Story on Bills, § 187, n. 5, and § 220.

At law, by virtue of Section 2918 of Code, sub-section 4, it was held in the case of *Gotewood* v. *Denton*, 3 Head, 382, if this had been a promissory note assigned after it was due, any right of action in favor of the payor of the note, existent at the time of the transfer, might be set-off against the claim in the hands of the assignee or indorser, when such indorsee should sue on the note; but we have never held in Tennessee that independent rights of action in the nature of cross demands, can be set-off by the active intervention of a court of equity, against a judgment in the hands of a party who has become the owner thereof by assignment complete under our law; and we think the case above referred to, and the section of the Code on which it is based, have no application to the remedy sought by this bill.

We think the claim of complainant should be repelled in this case, on the principle that the party had purchased *bona fide*, for valuable consideration, was a holder of the judgment, with no notice of any equities—the judgment remaining in full force and effect at the time—and, therefore no active relief should be granted in a court of equity against him.

George W. Catron, Adm'r, *v.* Wm. A. Cross *et als.*

We do not think, on sound principle, that the simple fact of the insolvency of the plaintiff in a judgment, would or ought to, interfere with his right to transfer and assign the same; and on such assignment, the assignee would take the judgment, subject only to equities against the judgment, not to independent rights of action that might be claimed against his assignor, of which he had no notice.

All the cases to which we have been referred, decided by our own courts, where a court of equity intervened, are cases between the original judgment creditor, who has become insolvent after obtaining his judgment, and his debtor, who has a debt against him. None of them present the case of assertion of equitable set-off, as against an assignee of a judgment, of debts due from his assignor to complainant, as in this case. See *Brazelton* v. *Brooks*, 2 Head, 194; *Edminson* v. *Baxter & Morell*, 4 Hay., Cooper's ed., top p. 112, 113.

The claims sought to be set off-in this case against the judgment obtained by Nolen, or a large portion of them, seem evidently to have been purchased by Catron on speculation; several of them assigned to him, without recourse on the indorsers from whom he purchased; and part of them owned before the judgment was obtained by Nolen.

We can see no particular merits in these claims, as shown in this record, and certainly nothing that calls for the active aid of a court of equity to enforce them against the assignee, who, as far as we can see, has obtained the judgment in good faith.

The decree of the Chancellor will be reversed, and

complainant's bill be dismissed. The costs of this court will be paid by complainant and his sureties. The costs of the court below will be divided between the parties complainant, and defendants.

Isaac D. West *v.* D. Weaver *et als.*

1. Appeal. *From decree not final. Settling principles.* Where a bill was filed to enjoin a sale of property of complainant under several judgments at law, on the ground that on account of conflicting liens, &c., great sacrifice would ensue, on a decree ordering a sale, but reserving questions of priority, and appeal by complainant: held that the appeal was not prematurely granted, and motion to dismiss denied.
2. Practice in Supreme Court. *Receiver* The Supreme Court will appoint a receiver in a cause pending there by appeal.

FROM MONTGOMERY.

Motion to dismiss appeal as prematurely granted.

Jas. E. Bailey, for the motion, insisted that the decree not being final, the appeal could not be granted on the ground of sale, as the sale was prayed by the complainant; that the only other ground of appeal from such a decree was, that it should determine the principles involved in the case, which was not done.

John F. House, against the motion, insisted that the sale before the settlement of the priorities, was,

what it was the very purpose of the bill to prevent, and so the principle of the case was involved in the decree.

NICHOLSON, C. J., delivered the opinion of the Court.

A motion is made to dismiss the appeal in this case, because it was prematurely granted by the Chancellor. The appeal was prayed by complainant, and granted after ordering a sale of his lands, under the assumption that the principles involved in the cause were determined by the decree, from which the appeal was taken, or that the decree settles complainant's right: although the case may not be disposed of as to others, Code, 3157.

The bill was filed in August, 1866, to enjoin the sale of a large and valuable real estate under various executions from courts of law and equity, alleging that there was a conflict of liens among the numerous creditors of complainant, and that a sale thus made would result in great loss and sacrifice, owing to the uncertainty and confusion as to titles, in consequence of the conflicting liens; that the result would be that a few creditors would absorb the estate at ruinous prices, leaving others equally meritorious, unprovided for. He alleges that large amounts of usury are embraced in the claims of some of creditors, against which he desires relief. He calls upon his creditors to come forward and interplead, to have the amounts of their

claims justly due ascertained; and that their conflicting liens may be marshalled, and their several priorities ascertained. And then he prays for the sale of the lands for the satisfaction of creditors, according to their respective priorities.

The cause progressed so far as to have all the matters of allegation inquired into and reported upon by the Master, preliminary to a decree settling the amounts of the several claims and their respective priorities of satisfaction. The cause came on for hearing in October, 1869. The decree recites that the Master has filed his report showing the sums due the several creditors, and proceeds: "And it appearing from the bill filed, and from the records in other causes in this court, that all the aforesaid debts are liens on the property of complainant; some by mortgages, which have been decreed to be foreclosed, others by decrees of this court, others by judgment at law, and others by bills filed to enforce the liens of judgments on equitable estates, the court, without now undertaking to settle the order in which said judgments and decrees shall be paid, doth decree that the said real estate shall be sold to pay the said creditors, &c.; the said complainant here in open court relinquishing all right in himself or creditors, to redeem, and upon the confirmation of the report, the sale, by agreement, shall be absolute." The decree closes thus: "The complainant may take proof and show payments made to any of the creditors, and not set out in said report; and John and Charles Minor, and Kate Stacker having filed bills

in the cause during the term, the defendants have until the January rules to answer so as not to delay the hearing."

From this decree complainant appealed on the 5th of November, 1869. It can not be said that the Chancellor settled the principles involved in the cause as preliminary to a sale of the lands. The bill was filed to have questions of conflicting liens, and as to alleged usury, settled. There was no principle involved in the sale of the land. No questions as to complainant's title to the land were involved. The principles to be settled in the cause, related to conflicting liens among creditors which detracted from the saleability of the lands. The complainant prayed for the sale of the lands for the satisfaction of his debts. We see on the face of the decree, that none of these questions of embarrassment, involving principles of law as to the priority of liens, were settled, but were expressly reserved. But the primary object of complainant in filing his bill was to have these questions settled before a sale of his lands should take place. The equity on which he claimed a status in a court of Chancery, rested on his right to require his creditors to interplead and settle their conflicting priorities of liens, to avoid a sacrifice of his property. The Chancellor had recognized his right to the relief he prayed for, by overruling the several demurrers. But in the decree under consideration he reverses his former holding, and by decreeing the sale of the lands, and reserving the questions as to the conflicting liens, he

settled the cause against complainant. By the express language of the statute it was competent for him to allow an appeal from this decision. We therefore hold that the motion to dismiss the appeal must be disallowed.

But we think it a proper case for the appointment of a receiver, and that motion we sustain.

Jos. Reynolds *et als.* v. Mary Brandon *et als.*

1. Appeal. Parties. *Former decree.* A decree of the Supreme Court, made upon an appeal by part only of the defendants interested, though the opinion of the court shows a doubt as to the power of the court to bind the others, infant defendants, will affect the rights of the parties as to whom no appeal is prayed, unless such right is saved by the decree. But if it appears from the opinion, and the manner in which the case was presented, that a particular question was not presented, or intended by the parties to be passed upon on the appeal, the court will not, on a subsequent appeal, be precluded from an examination of the question.

2. Chancery Jurisdiction. *Compromise of infants' rights.* Where a compromise is made of doubtful rights the Chancery Court has power, on behalf of minors, to ratify the compromise, and will exercise the power where it is plainly for the benefit of the minors.
Case cited: *Trigg* v. *Read*, 5 Hum, 545.

3. Marriage Settlement. *Power of married women.* A married woman, who by marriage contract has provided that her real estate "shall remain, and enure to her sole use and benefit, subject to her uncontrolled disposition and pleasure, as much as if she remained an unmarried woman, with the further right of selling or disposing of it by her last will and testament," has the power to dispose of the land by executory contract of sale.

4. Conversion. *Contract of sale.* An executory contract for the sale of land, operates a conversion of the property into personalty, and it goes to the distributees.

5. COMPROMISE. *Consideration.* Such a sale, if subsisting at the death of the married woman, with a bill filed afterwards to enforce it, is a valid basis of a compromise on the part of infant heirs with adult distributees.

6. DISTRIBUTEE. *May aid in setting up sale to establish conversion.* Where a bill is pending by a purchaser of land to enforce his contract, an agreement by a distributee of the estate of the vendor to furnish a deposit to prevent the dismissal of the bill, is not fraudulent on account of his relation to the estate, but his interest being to set up the sale and conversion, he might well aid the suit. The withdrawal of the distributee from such combination would form a valid consideration for a compromise with the heir.

7. TRUSTEE. *Bill for instructions.* A trustee for infants may maintain a bill for instructions as to matters arising after the creation of the trust; as a compromise, making it necessary to raise funds not provided for in the trust deed, or the refusal of one co-trustee in the deed to act.

FROM MONTGOMERY.

Chancery Court at Clarksville, Decree at June Term, 1868, THOS. BARRY, Ch.

J. E. BAILEY, for complainants.

R. W. HUMPHREYS and JOHN A. CAMPBELL, for respondents.

NICHOLSON, C. J., delivered the opinion of the Court.

James B. Reynolds died intestate, owning a large real estate near Clarksville, where he had lived, and leaving his brother Joseph and his sister Elizabeth, his only heirs. His property was partitioned between them, and in the division, Elizabeth became the owner of about 300 acres of the land. She was soon afterwards married to John D. Dolan, with whom, before the marriage, she entered into a contract, by which she retained the absolute title to all her property, reserving the same to her own sole

and separate use, with all the powers of a *feme sole.* She expressly retained the right of selling or disposing of her property in any way she might choose. Shortly before her death, in May, 1859, she and her husband entered into a contract with W. N. Bilbo, for the sale of her land near Clarksville, at $250 per acre. Their contract was reduced to writing and signed by the parties.

Soon after the death of Elizabeth Dolan, her brother Joseph, assuming to be the owner of her real estate as her sole heir, conveyed the same to two trustees, for the benefit of his daughter, Mary J. Brandon, and his step-daughter, Ellen Gorrill, with remainder interests to their children, and providing an annuity of $180, for a needy Mr. Thompson.

Some months after the death of Elizabeth Dolan, a bill was filed by Bilbo, against Dolan and the heirs of Mrs. Dolan, to set up and have enforced the contract of sale between Mrs. Dolan and himself, in relation to the land. His bill was demurred to, because he had not made the administrator of Mrs. Dolan, a party, and because he had not deposited in court with his bill, $5,000, which, by the contract, he was to have paid in cash. The demurrer was sustained, but leave given to amend the bill, in order that the administrator of Mrs. Dolan might be made a party; and time was given to Bilbo to make a deposit of the money. The bill was amended, and John D. Dolan, as administrator of his wife, was made a party.

It was the interest of Dolan that Bilbo's contract

for the sale of the land should be set up, and enforced. In that event he would become entitled, as husband, to the entire proceeds of the land. But if the contract should be defeated, the land would descend to the heirs of his wife, and he would get nothing.

Bilbo was insolvent and unable to raise the $5,000, but Dolan had the means and undertook to furnish the money. Upon this fact becoming known to Joseph Reynolds and the trustees, and adult beneficiaries under his deed, they all entered into a contract of compromise and family settlement with Dolan, by which he agreed to abandon his claim to the proceeds of the land as husband, upon the agreement to pay him $10,000, out of the proceeds of the sale of the land. This contract and settlement was executed by Joseph Reynolds, the acting trustee T. W. King, and all the adult beneficiaries, under the advice and approval of the solicitors of the minor beneficiaries, as well as of the other parties. When this contract was made, Dolan withdrew from Bilbo's suit, and it was dismissed on account of his inability to deposit the $5,000.

It was understood that the contract of compromise would not be binding on the minors, unless it was ratified by the Chancery Court. For this purpose, and in order to have the sanction of that court to a sale of the land in pursuance of the terms of the trust deed, and to raise the $10,000, for Dolan, and for carrying out the other provisions of the trust deed, the bill in this case was filed by Joseph Reynolds, the maker of the deed, King the acting trustee, and Brandon one of the adult

beneficiaries; against David Gorrill, the married women and minors, as defendants.

The Chancellor was appealed to for a decree of ratification of the contract of compromise and settlement, and for sale of the lands.

Proof was taken, and a decree was made, ratifying the settlement as being to the interest of all parties, complainants and defendants, and an order for the sale of the land in pursuance of the trust deed. The Clerk and Master was ordered to take proof and report as to the indebtedness of the trust estate, and as to the separate interests of the several beneficiaries under the trust deed. Upon the final decree, in November, 1866, exceptions were taken to the Master's report by three of the adult beneficiaries, who were not satisfied with the ruling of the Chancellor, and two of them, viz: Mrs. Gorrill and Mrs. Brandon, appealed to the Supreme Court. At December Term, 1867, the Supreme Court affirmed the decree of the Chancellor, with a slight modification as to the interest of Mrs. Thompson, one of the adult beneficiaries who had not appealed.

At the December Term, 1868, Brandon, the husband of Mary J. Brandon, for the benefit of the infant beneficiaries, filed the transcript for writ of error, which brings the cause back to this court for a second time.

The first question which presents itself, is, whether the decree made by this court, at its December Term, 1867, upon the appeal taken by Brandon and wife and by Ellen Gorrill, is conclusive upon the infant beneficiaries, who bring the cause here now by writ of error?

We find, that when this cause was before the court in December, 1867, an opinion was filed by Judge Milligan, in which some doubt on this question was intimated by the court; but, notwithstanding, they proceeded to confirm the decree of the Chancery Court, without any saving clause as to the minor parties, for whose benefit the suit is now prosecuted. Judge Milligan said: "In the aspect of this record, we feel doubtful, whether or not we can make any very authoritative decree with reference to the Bilbo compromise, so far as the minors are concerned, as they have not appealed. But, as the record appears, we are constrained to confirm the Chancellor's decree, except so far as it allows the exception to the Master's report, in relation to Mrs. Thompson's interest, under the deed of trust. This exception will be overruled, and the Master's report, in relation thereto, confirmed; and in all other respects the decree is confirmed." Accordingly a decree was entered confirming the decree of the Chancellor, with the exception as to Mrs. Thompson's interest.

It is obvious that Judge Milligan had no doubt as to the propriety of confirming the decree ratifying the Bilbo compromise, except that he doubted whether the appeal by the two adult beneficiaries, brought the cause up as to the minors. The decree was made, however, over his doubts, and probably under a belief that the compromise was a proper one, and it was properly made, so far as the effect of the appeal by two of the parties, is concerned, as we have had more than one occasion to hold, during the present term.

But, as we infer from the opinion of Judge Milligan,

and from the manner in which the record was presented to the court, that the question as to the propriety or validity of the compromise and settlement, was not intended by the parties to be passed upon by the court on the appeal, we feel that we are not precluded from examining now, the grounds on which the compromise is sought to be sustained on the one side, and set aside on the other.

In this view of the case, we shall state the conclusions at which we have arrived, after a careful examination of the record, without elaborating the various questions discussed at the bar.

The controversy arose out of the question, whether Mrs. Dolan, at the time of her death, was seized of the land in controversy, as realty; or whether by her contract with Bilbo, it was converted into personalty. The solution of this question depended upon two other questions; first, whether under the marriage agreement she had the power to sell the land; and next, whether the contract with Bilbo was subsisting and valid, at the time of her death.

By reference to the marriage contract, it appears, that "all the real property which she had inherited from her brother, Jas. B. Reynolds," and all her personal property, "shall remain and enure to the sole use and benefit of the said Elizabeth Reynolds, subject to her uncontrolled disposition and pleasure, as much so as if she remained an unmarried woman," as well as all property, real, personal, and mixed, which may hereafter accrue to her," "with the further right of selling and disposing of it by her last will and testament."

We see no difficulty in arriving at the true intent and purpose of this contract. It was the purpose and meaning of Mrs. Dolan, that she would retain the absolute power of disposing of all her property, either by selling or by last will and testament, as fully as if she had remained unmarried. The language employed clearly expresses this purpose and intention. It follows, that she had the power to sell the land to Bilbo, and if the contract made between them was subsisting and valid at the time of her death, it was, in law, a conversion of the realty into personalty.

Whether the contract was subsisting and valid at the time of her death, depended upon facts to be established by proof. To induce the Chancellor to ratify the compromise and settlement between the parties, complainants have taken proof bearing upon these questions. Such facts were proven as satisfied the Chancellor that there was real doubt as to the rights of the contesting parties, and such doubts as rendered it a proper case, in the judgment of the Chancellor, looking to the interests of all parties, minors, as well as adults, for the ratification of the compromise and settlement. In pursuance of the prayer of the adult parties, sanctioned by the advice and counsel of their solicitors, the Chancellor ratified and confirmed the contract. But now one of the adult parties who procured this decree to be made by the Chancellor, brings the case here by writ of error, for the benefit of the minors, and insists that this court, on the same proof, and with no further developments of facts, should reverse the decree below, and declare the compromise and settlement null and void as to the

infant beneficiaries. It is our duty to do this, if the proof fails to make out such a case of compromise of doubtful rights, as justifies the interposition of a court of equity.

First, as to the fact, whether the contract between Mrs. Dolan and Bilbo was subsisting and in force when she died. On this point, H. S. Kimble, a witness, states, that about the last of January, 1869, he drew up a contract between Mr. and Mrs. Dolan, on one side, and Bilbo on the other, which was signed by Mr. Dolan and Bilbo, and was to be submitted to Mrs. Dolan, by witness, for her signature, in the event she would consent to substitute it for the contract already executed. Witness says, that a short time before her death, he met with Mrs. Dolan, and mentioned the matter of the new contract to her, when she said she preferred the old contract to stand. From his conversation with her, witness was of opinion, up to her death, that the contract of sale to Bilbo still subsisted.

On the same point, R. W. McClure proved, that sometime in April, 1859, he visited Mrs. Dolan for the purpose of buying the land in controversy. He offered to give her $60,000, paying $10,000, in hand. She said she was sorry witness was too late; that they had sold the property to a man in Nashville, and that the papers were signed, sealed and delivered; that they could do nothing now. Witness then said to her, "When you and John die, what will you do with your large estate?" She said, if she outlived Mr. Dolan, it would be hers, and if he outlived her, it would be his." This conver-

sation had reference to her sale to Bilbo, and occurred only a few days before her death.

We find nothing in the proof which materially weakens the force of this evidence. So little, that we are forced to conclude, that in all probability, Mrs. Dolan died under the belief that the land was sold to Bilbo, and that the proceeds, after her death, would belong to her husband; and that she had waived the prompt payment of the $5,000.

Next, as to the validity of the contract with Bilbo. This involves the question of fraud in the procurement of the contract, which has been discussed at the bar with much earnestness.

It is a singular fact, that, in the bill filed in this case, to have the compromise ratified by the Chancellor, it is alleged that complainants had discovered that Bilbo and Dolan were in league with each other, and were acting in concert for the purpose of setting up and enforcing the contract of sale between Mrs. Dolan and Bilbo, and for fear they might succeed and thereby cut complainants out of the entire estate, complainants allege they agreed to compromise with Dolan, thereby giving up $10,000 of their claim to make sure of $50,000. And the fact of such a league between Dolan and Bilbo is presented as a reason why they made the compromise and why the Chancellor ought to ratify it. It is urged as a matter of merit, in the bill, that, by the compromise the suit of Bilbo was defeated. But, after the Chancellor yielded to the persuasive and convincing arguments thus addressed to him, and granted their prayer, and after resting for

over a year upon the decree so procured, this court is appealed to and urged to reverse that decree, for the same reason on which the Chancellor was asked to make it. It is now argued, that Dolan and Bilbo entered into a fraudulent league and combination to obtain title to the land in controversy, through the contract between Mrs. Dolan and Bilbo, which, it is insisted, was procured by the fraudulent league between Dolan and Bilbo, aided by James M. Davidson, an attorney, who drew and witnessed the contract. This charge of fraud is based upon no newly discovered facts, but is sought to be inferred from the same proof, which was taken to induce the Chancellor to ratify the compromise.

The proof does show, that when Bilbo filed his bill to set up and enforce his contract, and when the Chancellor required him to deposit the advance payment of $5,000, by a given day, that Dolan, who was interested largely in setting up Bilbo's contract, agreed to assist him in raising the required amount. We are unable to see any grounds for charging this as a fraudulent combination. They had a common interest in setting up the contract; if it was set up, Bilbo would get the land, and Dolan the price to be paid for it. Nor do we see that it was any evidence of fraud, that Dolan took out letters of administration upon the estate of his wife. That was the only legal mode by which he could set up his claim to the proceeds of the land; and it is shown by the evidence of McClure, that Mrs. Dolan had full information as to the legal effect of her sale to Bilbo; she told McClure that if her husband outlived her he would get it all.

Nor are we able, after closely scrutinizing the deposition of James M. Davidson, to find in it any grounds on which he could be implicated in a fraudulent conspiracy against Mrs. Dolan. He proves that she entered into the contract, after having been fully informed as to the terms and legal effect of it, and that she understood its provisions, was satisfied with them, and signed the paper freely and voluntarily. It is shown that Bilbo was insolvent, but the terms of the contract guarded her against that by requiring $5,000 to be paid in advance. It is evident that it was intended by Bilbo to be a speculation. But, as far as the facts are developed in the record, we see nothing on which we are justified in attributing fraud to Dolan, Bilbo or Davidson. What facts outside of the record indicating fraud may exist, we have no right to know, nor has it been suggested that any such do exist. The proof falls so far short of showing, that the contract between Mrs. Dolan and Bilbo was procured by fraud, that the preponderance in favor of the fairness and validity of the agreement is strong and decided. The greatest wonder we feel, after examing the whole case, is, that Dolan should have compromised a claim for $60,000, resting on such proof as we find in the record, for one-sixth of the amount. Looking to this proof, we are unable to see how the Chancellor, having a proper regard for the minor beneficiaries, could have done anything else than to ratify the compromise and settlement.

We have already stated that, upon the death of Elizabeth Dolan, her brother, Joseph Reynolds, claimed the land in controversy, as her only heir. He immedi-

ately conveyed the same in trust to T. W. King and G. A. Harrell, for the use and benefit of his own family. Harrell failing to act as trustee, and doubts arising as to the power of King, the remaining trustee, to go on and execute the trusts of the deed, the bill in this case was filed by King as well as by Jos. Reynolds and the other adult beneficiaries, for the purpose of having the instructions and directions of the Chancellor in executing the trusts, and for the additional purpose of obtaining the sanction of the court to the family settlement and compromise made with Dolan. Such applications to Courts of Chancery, by trustees, for instructions and directions, are of every day occurrence: Story's Eq., § 1267; Adams' Eq., 379.

The questions discussed at the bar, as to the power of the Chancellor to decree the sale of lands belonging to infants, are not properly involved in this case. The power to sell is given in the deed to the two trustees; and upon the refusal of one to serve, it was proper for the remaining trustee to apply to a Court of Chancery for its aid in carrying out the provisions of the trust deed. The fact that a compromise of a doubtful litigation had been made, rendered it still more necessary for the application to the Chancellor, not only to procure his sanction of the compromise, but of having an appropriation of a sufficient amount of the trust funds to satisfy the sum agreed to be paid to Dolan, for a relinquishment of his claim to the proceeds of the land.

The jurisdiction of a court of equity to enforce and ratify contracts for the compromise of doubtful rights, is too well settled to require to be supported by authorities.

In the *Union Bank* v. *Geary*, 5 Peters, 99, it is said, that

compromises are to be favored, whatever the nature of the controversy compromised. In *Moore* v. *Fitzwater*, 2 Randolph, 442, it was said, "whether the title at the time of the contract was in the appellant or appellee, we do not deem it material to inquire. It is sufficient, that the parties themselves have settled the question; and as there was no fraud or undue advantage, we would not disturb it, even if assured that the appellees had no title."

Where a doubtful question arises, such as a question of construction upon a will, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportion which may be agreed upon: *Naylor* v. *Winch*, 1 S. & S., 564. In *Trigg* v. *Read*, 5 Hum., 545, Judge Turley said: "In the cases of family compromises, all that need be said here is, that agreements affecting them are upheld with a strong hand, and an equity has been administered in regard to them, which has not been applied to agreements generally, upon the ground that the honor and peace of families make it just and proper to do so: 1 Story's Eq., § 132.

Whenever a court of Chancery is called upon to sanction and enforce a contract of compromise, which involves the rights and interests of minors, it is bound, in the exercise of its general superintendence and protective jurisdiction over the persons and property of infants, to see that their rights and interests are not injuriously affected by such contract. They must have their day in court; they must be represented by guardians *ad litem;* the proof must satisfy the conscience of the Chancellor that their rights and interests are promoted and secured by the compromise. When these requisites are complied with, it is not simply the right, but the duty of the Chancellor to

uphold and enforce such compromises, especially where they settle family disputes, and put an end to litigation as to doubtful rights. If the Chancery Court could not exercise its jurisdiction for the protection of the rights and interests of minors in such cases, the law extends to them less protection than it extends to adults.

We are satisfied that the jurisdiction of the Chancellor was rightfully and judiciously exercised in the case before us, and we affirm his decree.

A. J. McDonald *et als.* v. Frances Kirby *et als.*

1. Confederate Treasury Notes. *Sale for. Creditors.* The fact that land was sold for Confederate Treasury Notes, does not affect the validity of the sale as to creditors of the vendor.
2. Judicial Knowledge. *Belligerent occupation.* Whether a particular locality was held by one belligerent, or the other, at a particular time, is a question of fact to be determined upon proof, not upon judicial knowledge.
3. Registration. *Not affected by consideration of paper.* The fact that a paper, registered after the occupation of the county by Federal authority, recited a Confederate money consideration, does not affect the validity of the registration.
4. Practice. *Remanding cause.* That a case has been prepared in view of a course of decision since reversed, is no ground for remanding the cause for cumulative proof on points not controlling under the former holdings.
5. Costs. *Changed on affirmance.* Decree reversed as to costs, though not changed in any other particulars.

FROM SMITH.

Chancery Court at Carthage, February Term, 1867.

W. H. DeWitt, Special Ch.; Barry, Ch., being incompetent.

Jas. W. McHenry, for complainants.

Freeman, J., delivered the opinion of the Court.

The questions presented in this case grow out of an effort on the part of complainants in the bill above named, together with complainants in four or five other bills consolidated with it, to subject a tract of land once owned by Kirby, and sold to the defendant, Allen, to the payment of debts due from Kirby.

The allegations of the bills are substantially the same. They seek the relief prayed on the ground that Kirby had sold the tract of land in controversy, of about 490 acres, in Smith county, to defendant, Allen, on December 1st, 1862, for $18,000 in Confederate money, and that Allen had gone into possession of said land, taking a bond for title from the said Kirby of that date, which was duly probated and registered on August 7th, 1865; and that said bond showed on its face the consideration to be Confederate money.

They charge that Confederate money being the only consideration that passed between the parties, "the trade was illegal and void, and is a fraud upon the creditors of defendant, Kirby, and has been a hindrance and delay upon their rights as creditors, as defendant, Kirby, has no other property liable to the payment of the debts of his creditors."

They then allege, "that the above trade was made after the Federal authorities occupied the country; and that it

was contrary to orders upon the subject of using Confederate money; and such trades are contrary to public policy."

Upon these two allegations, and the law and facts involved in them, the decision of this case must turn. The case has been argued with marked ability and zeal on both sides.

We hold, distinctly, that a sale of property for Confederate money, whether it be a horse or a princely estate, is not, by reason of that fact alone, fraudulent and void, as against creditors.

In view of our repeated adjudications on the question of Confederate money as a consideration for a contract, and as entering into the private contracts of individuals, during the time it was in circulation as the currency of the States engaged in the rebellion, no other conclusion could be arrived at. Indeed, this point is not now very seriously pressed upon us by complainant's counsel.

The other question presented is, that the trade was made after the occupation of the country by the Federal authorities, and was, therefore, void, as being against the policy of the government in possession at the time.

This allegation is distinctly made in the bill, the defendants are required to answer it, and that under oath, there being no waiver of the oath in the bill.

The answer of the defendant, Allen, to this allegation, Kirby not answering, (the bill being taken for confessed against him,) is, that, at the time of the purchase of the land, all the south side of the Cumberland river, in Smith county, was in the Confederate lines, and that Confederate money was recognized as the currency of the country, and

that Confederate money was of equal value to any other money in circulation.

The only testimony on this question in the record, that is, as to the occupation of the country, is the deposition of G. W. Catron, taken by defendants. In his cross-examination, he states, "that the country about Kirby's was in the possession of the Confederates, up to about March, 1863. Up to that time, Confederate money was current, and the principal money in circulation."

So far as the testimony goes, the fact is distinctly proven, that the country where the land lay, so far from being occupied by the Federal authorities, was occupied by the other contending party, or at any rate held by that party, and therefore, no orders of the Federal military authorities would be operative to vitiate the contract.

It is most earnestly maintained, however, that the court can take judicial cognizance of the fact, as a matter of general history, that the county of Smith was in Federal occupation and under Federal control from the fall of the City of Nashville; and that all Middle Tennessee had been restored to the rule of the Federal Government early in 1862; and that the Confederate occupation at the time was but a temporary occupation by a military force; and that such occupation could not displace the power of the Federal Government, but that the character of the country continued Federal territory, notwithstanding this temporary occupation by the Confederate forces.

On this question, it will be seen, from the allegations of the bill itself, that nothing more is claimed, or charged, than a military occupation of the country at the time of the trade, as the illegality of the contract is predicated

on the fact alleged "that it was contrary to orders upon the subject of using Confederate money," and such trades are contrary to public policy.

Now we know that orders are issued by military commanders, and were in fact, as we may assume, issued in many cases for the regulation of districts of country occupied by either one of the belligerents. In this view of the case, the express denial of the answer, without the evidence of Catron, would be conclusive of the matter put in issue by the bill and denial of the answer.

However extended may be the modern doctrine of judicial knowledge, this court does not nor can it take judicial cognizance of the extent of military occupation of the State of Tennessee by either belligerent while that occupation was being contested, whatever we might hold on the question after the contest ceased, and but one party occupied the country and permanently maintained that occupation.

There is no need for judicial cognizance where the facts are so recent as scarcely to have as yet passed into the domain of history, and are so readily susceptible of proof. And being of so uncertain a character in their very nature, based on the movements of armies however large, we do not think they come within the established rules of law on this question.

The rule is thus stated by Justice Selden, in delivering a very able and instructive opinion on the question in the Court of Appeals of New York: "There are, no doubt, cases in which courts, upon questions addressed to them, may take judicial notice of matters of general history and of public and uni-

versal notoriety, which admit of no dispute," and that such evidence is only admissible to prove facts of a general and public nature, not those which concern individuals or mere local communities: *McKinnon* v. *Bliss*, 21 New York Reports, 214, 216.

Within these principles, which we hold to be the law on the subject, we think it clear that we can not decide the question of fact raised by the pleadings, of military occupation of the country, except upon the proof in the case, and that taken in connection with the answer of defendant Allen, is conclusive in favor of defendant.

It has been urged that we can not treat the title bond as a registered paper, because it shows on its face that it was for Confederate money, and was only registered in 1865, when Tennessee was certainly not one of the Confederate States or in Confederate occupation.

We need only say, that the consideration of the bond can have no effect on its registration, nor in any way affect the validity of the registration.

If the paper was valid when made, registration simply serves to fix notice of the contract as against creditors of the vendor, but neither makes nor unmakes the contract. If the contract was valid when made, it gave notice of a valid contract; if void, then of a void contract; but had no effect either way in making the contract either valid or void, except, that without registration, the creditor might have overridden the claim of the vendee; with it, the vendee could maintain his right under the contract.

It is very earnestly insisted, that, as this case was

prepared in view of a series of decisions of our predecessors, holding contrary views on the subject of Confederate money, from what is now held; the case should be remanded to the court below, in order that the parties might take proof on the question of Federal occupation, and as to when the contract was in fact made.

We can see no grounds on which we could do this, even though a mere meritorious case was before us. But we can see satisfactorily, that the equity of the case has been reached. The proof shows, that the money received by Kirby for this land, has, except a small amount, gone to the payment of his debts, either directly or by having been invested in other lands; that Confederate money at the time, was about of equal value (if not fully so) to any other paper currency in circulation in the country. We see no evidence of the slightest bad faith on the part of Allen, the purchaser, nor in fact is any alleged, further than the purchase of the land, and payment for it, according to his contract, in Confederate money.

The Chancellor dismissed the bills of complainants, but taxed Francis Kirby and Allen, with the costs.

We affirm his decree, except as to taxation of costs. Complainants will each pay the costs incurred in reference to their respective bills in the court below, and will jointly with their sureties in their appeal bond pay the costs of this court.

John S. Fulton *et als. v.* John M. Davidson *et als.*

JOHN S. FULTON *et als. v.* JOHN M. DAVIDSON *et als.*

1. CHANCERY SALE. *Bill to sell to pay debts and partition.* A bill to sell land and slaves to pay debts, and for distribution, may be maintained upon the ground of necessity to sell for partition and distribution, though the case made for necessity to pay debts wholly fail.

2. ADMINISTRATION. *Equitable assets. Slaves.* From the time it was held by the Supreme Court that slaves passed to the distributees, and not to the executors, it resulted that they became equitable assets.

3. SAME. *Same. Liability of joint executors.* Executors are not jointly liable upon their joint bond for the administration of equitable assets coming to the hands of one of them.

4. EXECUTOR. *When he acts as such. When as a receiver.* An executor appointed by a court to sell lands and slaves, or to receive the proceeds, acts as commissioner and receiver, and not as executor, and is not liable upon his bond as executor. One executor is not liable for the act of a joint executor in relation to such fund, unless he concur in the act.

5. SAME. *Same. Joint receipt. Solicitor drawing entry not estopped.* The fact that one executor was the solicitor who drew the order in a cause directing such a fund to be paid to the executors, and reciting that it was so paid, would not render him liable for the receipt of the moneys by the other executor. Nor would it estop him from showing that the moneys were in fact received by the other executor; and the facts being shown by the receipts filed with and made part of the decree, he was exonerated.

6. SAME. *Mistake as to effect of order.* That the court making the order probably misapprehends the character in which a person receives a fund, and that he himself does so, and carries it into his settlement as executor, instead of accounting with the court from which he received it, can not control the legal effect of the facts and make a receipt by him, of funds arising from a sale, under decree, not directed by the will, an executorial act.

7. SAME. *Act of* 1838, *c.* 111, *s.* 18. *Trust must be by will.* To render executors and their sureties liable for the administration of a trust under the act of 1838, c. 111, s. 18. The trusts must arise under the will; not be imposed by the act of a court.[1]

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[1]See *Lester* v. *Vick*, 2 Heis., 476, and *Porter* v. *Moores*, *post*.

John S. Fulton *et als. v.* John M. Davidson *et als.*

8. TRUSTEE. *Interest.* The holding of a fund probably required for the payment of debts, will not charge a trustee with interest, in the absence of any proof that the fund was used for the profit of the trustee.

Case cited: *Williams* v. *Turney*, 7 Yer., 172, 213.

9. EXECUTOR. *Liability for rents.* Executors charged by the will to make a crop on the testator's lands for one year after his death, are not responsible for the management of the real estate after that period, except so far as they assume control or receive rents.

10. CHANCERY SALE. *Purchaser. Loss on re-sale.* A party buying lands at a Chancery sale, and failing to pay according to the terms of sale, is liable on a re-sale to the payment of any deficiency in price.

11. SOLICITOR. *Minors, Complainants in bill to sell land; Purchasers at sale, not subject to release.* A solicitor who filed a bill for sale of land, joining minors as complainants, before the decision of *Davidson* v. *Bowden*, 5 Sneed, 129, did not forfeit his right to compensation, or incur any liability, for the reason that purchasers at the sale were released by the court. It was error for the court to release the purchasers on their motion.

Cases cited: *Elliott* v. *Cochran*, 2 Sneed, 468; *Check* v. *Wheatly*, 3 Sneed, 494; *Winchester* v. *Winchester*, 1 Head, 462.

12. SUPREME COURT. *Decree. Remand for amendment.* Where a cause was brought to the Supreme Court by purchasers under a decree, to have it reversed because infants were made complainants, instead of being made defendants, and the court remanded the cause for amendment and further proceedings, whereupon the court below released the purchasers and made a new sale, this was held erroneous. The position of the infants should have been changed, and the sales confirmed.

13. SOLICITOR. *Executor may claim compensation as.* An executor who is a solicitor, may claim solicitor's fees, as well as compensation as executor, if he perform the office of both.

14. CHANCERY SALE. *Allowance to Commissioner. Considerations which affect.* A commissioner having made one sale, when the compensation allowed by law was inadequate—on a re-sale the court allowed, the law having been changed, a more liberal compensation on account of the insufficiency of the other allowance.

15. SAME. *Same. Change of law pending service.* The rate of compensation being charged after a sale, but before collection of notes, etc., the court below allowed the higher rate, and the Supreme Court refused to disturb it.

16. TRUSTEE. *Loan contrary to order.* A commissioner for sale of lands and slaves, being appointed a trustee for infants, with directions to loan out the funds arising from the sale belonging to them, on good security, having loaned the fund without security, to a person then solvent,

was held liable for the loss of the fund by the subsequent insolvency of the borrower. But the borrower having furnished necessaries to the minor beneficiaries, the trustee was allowed the benefit of the credit arising therefrom.

17. APPROPRIATION OF CREDITS. The share, as heir and distributee of an executor, in an estate, to which he was indebted for land bought, with security, and also for funds held as executor and receiver, applied by the court in discharge of the first named indebtedness.

Case cited: *Bussey* v. *Gant*, 10 Hum., 238.

FROM LINCOLN.

Chancery Court at Fayetteville. Decree at October Term, 1868, pronounced by JOHN P. STEELE, Ch.

A. S. MARKS, for the legatees, submitted the following propositions and authorities, with an argument:

First—As to the *rents*, the Executors were the *Receivers* of the court; and they are *estopped* from denying it.

Second—The executors were a *legal unit* under the statutes and their bond. The slaves were *legal assets*, and embraced in their bond. See *Ross* v. *Wharton*, 10 Yer., 190; *Hughlett* v. *Hughlett*, 5 Hum., 453; *Torbett* v. *Reynolds*, 4 Hum., 215; *Kincaid* v. *Rogers*, 10 Hum., 83; *Bell* v. *Speight*, 11 Hum., 451; *Cheek* v. *Wheatly*, 3 Sneed, 484; *Cornell* v. *Corneil*, 2 J. J. Marshal, 195; *Graden* v. *Graden*, 1 McMullin's Ch., 410; Torbett's case, 1 Heis., 107?

Third—But if not, bonds were taken in the Chancery Court, and *if not*, there is *an estoppel.* See *Decherd* v. *Blanton*, 3 Sneed, 373; *Strong* v. *Harris*, 3 Hum., 451; *House* v. *Wakefield*, 2 Cold., 325; *Whitney* v. *Belden*, 4 Paige Ch. R., 140; *Ibid*, 273.

Fourth—Farquharson *disobeyed* the orders of the court, whereby the fund in his hands was lost, and therefore he must account for it, and can have no compensation; and this is so upon well settled principles.

Fifth—Farquharson can have no more than $100 commissions. See Act of 1842, Nicholson's Sup., p. 63; Code, §§ 4551, 4552, 4553, 4554; *Woodward* v. *Williams*, 11 Hum., 323; 5 Sneed, 67, and the authority there referred to in 2 Sneed; 1 Yer., 261; Martin & Yerger, 168.

JAMES W. NEWMAN, for the same parties, submitted the following, with an argument.

The surviving executors are jointly liable with John S. Fulton, on their joint bond, for the $12,800 rents, $2,303.41 negro hire, and the $10,000 paid John S. Fulton, part proceeds of sale of negroes under the Act of 1837–8, c. 111, § 18. *Hughlett* v. *Hughlett*, 5 Hum., 453; *Lester* v. *Vick*, 2 Heis., 476.

The surviving executors are liable as *trustees* for the rents, negro hire, and $10,000 paid John S. Fulton: 10 Yer., 270; 2 Swan, 377; 5 Johns. Ch. R., 287.

They are *jointly liable* for these funds, because they were paid over to John S. Fulton "by their *act, direction* and agreement:" 2 Swan, 287;[1] 10 Yer., 270, bottom of page; 5 Johns. Ch. R., 287; 2 Story's Eq. Jur., 524, 525, n. 1.

They are jointly liable, because of the private agreement that John S. Fulton was to have control of the money matters, Bright of the law business, and McDonald of the farming operations. Hill on Trustees, 441.

[1] *Sic*, but probably, 377.

They are jointly liable for neglect to look into Fulton's settlement, and institute suit, if necessary: Hill on Trustees, 441.

They are *jointly liable,* because they were induced to place the $10,000 in the hands of John S. Fulton, on the assumption that it was needed to pay debts, which assumption turned out to be untrue: Hill on Trustees, 440, 441.

They are jointly liable, because the trust accepted by them was a *directory,* as well as *discretionary* trust: 10 Yer., 269; 2 Swan, 374.

They are also liable for *interest simple,* if not compound. See 10 Yerger, 169; 7 Yerger, 213; 2 Williams on Executors, 1105, 1109, 1137.

Gen. Bright and John S. Fulton can not receive compensation both as *executors* and *attorneys,* they occupying "a *double fiduciary* position with regard to the subject matter" of the trust fund: *Robinson* v. *Petit,* 2 White & Tudor's Lead. Cas. in Eq., Part 1, pp. 353, 378.

They can not *receive any* compensation as executor or attorney, because of their *gross neglect* and unskillfulness. See authority last cited, pp. 354, 360, and 361.

No compensation is allowed executors when they fail to make settlements, and when they use some, and permit other portions of the trust funds to be wasted: Am. Ch. Digest, 425; Williams on Ex'rs., 1574, note at bottom of page.

Trustees, are to be allowed liberal compensation when

they discharge their duties *faithfully*, but not otherwise: *Coffee* v. *Ruffin*, 4 Cold., 524.

The allowance by the Chancellor to Gen. Bright of $3,500, was *grossly excessive: Planters' Bank* v. *Hornberger*, 4 Cold., 532.

The compensation and fees allowed R. Farquharson, Clerk and Master, are unwarranted by law: Act of 1842, 91, Nich. Sup., 63; Code 4552; *Woodward* v. *Williams*, 11 Hum., 323.

The Clerk and Master is entitled to no compensation for his services, because of his failure to obey the orders made upon him in this cause: Code, 4471 to 4474; 31st Ch. Rule Code, p. 984.

The Clerk and Master, Farquharson, is not entitled to the $1,500 compensation for services in managing the minors' funds as trustee. The trust was *purely directory;* and when a *directory trust* is violated, no compensation is allowed: 2 White & Tudor's Lead. Cas., part 1, top p., 359, 360.

J. D. WADE, with them, cited on the effect of a joint bond: W'ms on Ex'rs, 447 n., 811 n., 15 n., 30 n; 3 Hals. C. R., 557, 5 Hum., 453, 463, 10 Yer., 263.

Agreement of executors to divide duties: Sto. Eq. Jur., §§ 1280, to 1284; W'ms on Ex'rs, 1529 n., 1530, n., 1547, n.,

Drawing decree by co-executor amounts to consent: Sto. Eq. Jur., 1280, 1284; W'ms on Ex'rs, 1548, 1559, *et seq.*

For what assets executors are liable on their bond: Sto. Eq. Jur., §§ 551, 552, 552*a*; Sto. Eq. Pl., §

163; W'ms on Ex's, 1718 n.; Act of 1837–38;—Beavan, 398; 2 Lead. Cas. Eq., 72 n.; Code ——; 1 Sneed, 365; Stat. 5, Geo. 2.

Executors not entitled to compensation until they have completed the administration: W'ms on Ex'rs, 1575 n., 19 Ala., 438; 4 Grattan, 293. Compensation not allowed in a double aspect: 4 Edw. Ch., 284; W'ms on Ex'rs, 1575, 1577 n., 1581 n.

Solicitor forfeits fee by want of skill, &c. Only represented adults: 5 Paige, Ch. 62; Act of 1837–8; 1 Swan, 75. Fulton's interest ought not to go in satisfaction of his *devastavit*, but his purchases: Sto. Eq. Jur., §§ 412, 423, 424; W'ms on Ex'rs, 1766, 796, 798, 800, 801 n., 819, 1471, 1700, 1710.

BOYLES, BURNAM & THOMAS, for the administrator of John S. Fulton, insisted that as to the real estate, as the same was not by the will vested in the executors, the order of the court authorizing them to rent out the land, could not put a duty upon them as executors, but as trustees only: 2 Redf. on Wills, 120.

The accounts kept by a trustee evidence for him: *Osgood* v. *Franklin*, 2 J. C. R., 2.

A trustee is only liable to pay interest when he has used the fund or made interest, or by fraud or negligence has failed to make it: 2 W'ms on Ex'rs, 5 Am. ed., 1670; and n. 1; *Kellar's Ex'rs* v. *Beeler*, 5 Monroe, 578; *Hall* v. *Sims*, 2 J. J. Marshall, 572; *Oldham* v. *Collins*, Ib., 50; *Quinn* v. *Stockton*, 2 Litt., 344; 1 Barb. & Har. Eq. Dig., 515; *Cavendish* v. *Fleming*, 3 Munf., 198; *Sparhawk* v.

Buel, 9 Verm., 41; *Overstreet* v. *Potts*, 4 Dana., 138; *Spruill* v. *Cannon*, 2 Dev. & Bat., 400; *McNair* v. *Ragland*, 1 Dev. Eq., 516.

J. B. LAMB and JOHN C. BROWN, for John M. Bright, cited and commented upon the following authorities:

As to liability of co-executors for the acts and defaults of each other: *Hughlett* v. *Hughlett*, 5 Hum., 453; 2 W'ms on Ex'rs, 5 Am. ed., 1652–3; *Deaderick* v. *Cantrell*, 10 Yer., 268, 273; *Sutherland* v. *Bush*, 7 John. Ch., 22; *Ochiltree* v. *Wright*, 1 Dev. & Bat., 336, 341; *Williams* v. *Maitland*, 1 Iredell, 93; *Johnson* v. *Johnson*, 2 Hill's Ch., 293; *Clark* v. *Clark*, 8 Paige, 153; *McNair* v. *Ragland*, 1 Dev. Eq., 153; 5 Johns. Ch., 296; 4 Johns. Ch., 629; 6 Johns. Ch., 16; 6 Johns. Ch., 452; 7 Johns. Ch., 22; 5 Johns. Ch., 28; 4 Barb. & Har. Dig., 196; 1 Barb. & Har. Dig., 511; White & Tudor's Leading Cases, part 2nd, 292, 280, 306; 4 Vesey, 596; 2 Vesey, 678; 4 Vesey, 688; 11 Vesey, 252, 333; 12 U. S. Sup. Ct. Rep., Curtis' ed., 234.

To constitute a *devastavit*, the acts of an executor must be tortious: 7 Yer., 172–3; 2 W'ms on Ex'rs, 3 Am. ed., top p. 1530, 1531, 1533; 2 W'ms on Ex'rs, 5 Am. ed., top p. 1629; *Ib.*, 1638, 1639; 1 Iredell's Ch., 92; 2 Dev. Ch., 488; 2 Dev. & Bat. Ch., 442.

Insisted that these authorities support the following propositions, as the law applicable to this case:

1st. Each executor must account for the assets which come into his own hands.

2nd. To render an executor liable for a *devastavit*, his conduct must be shown to be *tortious*, as by squandering

the assets himself, or permitting them to be lost by gross neglect.

3rd. To hold one executor liable for the *devastavit* of his co-executor, it must appear that he contributed to it in some way, or made the act of *devastavit* his own by consent given to it.

As to receivers, they cited: *Waters* v. *Carroll*, 9 Yer., 102, 107, 109; *Whitesides* v. *Lafferty*, 3 Hum., 150. Presumed to keep correct accounts: *Ochiltree* v. *Wright*, 1 Dev. & Bat. Eq., 341–2; *Osgood* v. *Franklin*, 2 Johns. Ch. R., 26; 1 Dev. Eq., 528.

As to charging executors and trustees with interest, they cited: 2 W'ms on Ex'rs, 5 Am. ed., 1670, and notes; 2 J. J. Marshall, 512; 4 J. J. Marshall, 50; 2 Litt., 344; 5 Monroe, 578; 1 Barb. & Har. Dig., 514, 515; 1 Dev. Eq., 524, 525.

As to practice and pleading: 3 Hay., 36; 3 Head, 575; 5 Hum., 428, 435; 2 Head, 543; 1 Cold., 170.

As to attorney's fees: *Newnan* v. *Washington*, Mart. & Yer., 80, 81.

As to Bright's right to a lien upon John S. Fulton's interest in the estate: 13 Eng. L. & Eq., 26; *Towles* v. *Towles*, 1 Head, 601; 19 Johns.

JOHN C. BROWN also presented an elaborate argument for R. Farquharson, commissioner. On his liability to pay interest, he cited the 32d Chancery Rule; Code, 4475.

Insisted that though Farquharson had not appealed, yet he was entitled to assign errors in the decrees, and have his compensation enlarged, citing *Maskall* v. *Maskall*, 3 Sneed, 208; 11 Hum., 389; 5 Hum., 26, 36.

John S. Fulton *et als.* *v.* John M. Davidson *et als.*

NICHOLSON, C. J., delivered the opinion of the Court.

The questions to be decided in this cause, arise out of the administration of the estate of the late James Fulton. He died in Lincoln county, on the 15th of February, 1856, having made his will in 1843, which was materially altered by a codicil executed only three days before his death. He was seized and possessed a large estate, consisting of lands, slaves and other personal property. He appointed John M. Bright, John S. Fulton and Robert A. McDonald, to execute his will. They accepted the trust, proved the will, were qualified, and executed a joint bond, with securities, for the proper discharge of their duties.

The lands and slaves were sold, under decrees in the Chancery Court, yielding about one hundred and thirty thousand dollars. But of this amount, it is alleged that about twenty-seven thousand dollars have been lost to the legatees and devisees, and that two of the executors, John M. Bright and John S. Fulton, and the Clerk and Master, Robert Farquharson, should be held responsible for the loss.

The several questions in litigation between the parties, are raised upon numerous exceptions to the report of a special commissioner, who was appointed with plenary powers, to take proof and report upon all the matters contested between the parties. We deem it unnecessary to allude in detail to the exceptions taken to the report of the commissioner, on both sides, as we are satisfied that there are a few principles of law which must control the result.

We deem it proper to remark, that we find nothing in the record which creates the slightest doubt as to the entire integrity and good faith of all the parties involved in the litigation. There is no reason to believe that there would have been either loss to the estate, or litigation among the legatees, but for the public events which suspended the final settlement of the administration, and which resulted in the death of one of the executors, who had special charge of the financial department of the trust.

It is one of those cases in which a court of equity is called upon to apply the principles which must determine where a loss is to fall, where neither fraud nor bad faith can be attributed to either party.

It is not controverted, that when John S. Fulton made his last settlement, prior to entering into the military service in which he lost his life, he had in his hands a considerable amount of the funds of the estate. Nor is it disputed, that he died with this amount unpaid and unaccounted for.

The controversy is, whether John M. Bright, as his co-executor, is responsible to the estate for the amount so unaccounted for. The determination of this question depends upon the character of the trust assumed by the executors, the circumstances under which the funds came into the hands of John S. Fulton, and the connection which John M. Bright had with the receipt of the funds by John S. Fulton.

When John M. Bright, John S. Fulton and Robert A. McDonald were qualified as the executors of James Fulton, they undertook the execution of his last will and testament. By their bond, they gave security for the

faithful execution of the trust. Whatever duties or trusts were devolved upon them by the terms of the will, they undertook faithfully to discharge. For the duties and trusts which they assumed, we must look to the will.

As already stated, the original will was made in 1842. It is remarkable for its brevity, as follows: "I, James Fulton, of Fayetteville, Lincoln county, Tennessee, do make this my last will and testament: 1st, I desire that all my just debts be paid. 2d, I give and bequeath the whole of my property, both real and personal, to my wife and my nine children, to-wit: Alfred, James, John, Frank, Martha, Jane, Laura, Virginia, and the youngest child now living, which has not been named, together with any children I may hereafter have; said property to be equally divided among my wife and said children; and should any of my said children die before attaining to the age of twenty-one, unmarried, then the share which I have bequeathed to such child shall be equally divided among the balance of my said children. Witness my hand and seal this 20th of September, 1842."

By this will, no executors were named, and the only duty specified to be performed by his representative, is that of paying the testator's just debts. For this purpose, the representative would be governed by the law, in appropriating the personal effects, as the testator gives no directions as to the special manner in which, or the property out of which, he desired the debts to be paid.

As already stated, on the 12th of February, 1856, the testator executed a codicil, in which he provides, that the property given to his several daughters, by his will o.

1842, should be for their sole and separate use. He also makes special provisions, and gives special directions for ascertaining the share of his daughter, Margaret Davidson. He next specifies the advancements made to several adult children, and provides for equalizing the shares of his three minor children. He gives his Law Library to his sons. He then makes an alteration in his former bequests to his wife, giving her additional articles of property. He then adds this item: "It is also my will and desire that my farm on the north side of Elk River be carried on the present year, before any division; and cotton and mules sold for cash, here or elsewhere, by my executors, for paying my debts." He then nominates and appoints R. A. McDonald, John S. Fulton and John M. Bright his executors.

It is clear that the only duty imposed by the codicil upon the executors, in addition to that imposed by the original will, was in regard to having the farm carried on for the year 1856, and for selling his cotton and mules, at home or elsewhere, for the payment of debts.

It follows, that the entire trusts assumed by the executors, upon their qualification, were to have the just debts paid and to have the farm carried on for the year and to sell the mules and cotton, at home and elsewhere, for the payment of debts. The joint bond, which the executors made, is not in the record, but we may assume that it was in the usual form, and that it bound the executors to discharge all the trusts imposed upon them by the will and the law. The will imposes no trusts as to the land or slaves, upon the executors, except as to their

use during the year 1856, in making a crop; and the bond which they executed could impose no other, than the corresponding obligations.

Upon the qualification of the executors, the title to the personal estate of the testator, except the slaves, vested in them in trust, for the payment of his debts, and after their payment, for the distribution of the residuum. Until the construction of the Act of 1827, c. 61, made by this Court at its December Term, 1853, in the case of *Savage* v. *Hale & Coggin*, 1 Sneed, 365, slaves were considered as personal property, and as such, legal assets in the hands of administrators and executors. In that case, the court held, that "since the act of 1827, c. 61, the title to slaves does not pass to the personal representatives, as before that act was the case as to all personal property, but to the distributees, as land goes to the heirs on the death of their ancestor, with no other exception but that the administrator is bound to take possession of them, and if not required to pay debts, to distribute them." This decision has been followed and recognized in numerous cases from that time down to the present term of the Court.

It follows, that upon the qualification of the executors, the slaves did not pass to the executors as legal assets, but that until it could be ascertained, whether they would be required in payment of debts, it was the duty of the executors to hold and protect the slaves: *Cheek* v. *Wheatly*, 3 Sneed, 484; and when the executors should ascertain that the slaves would be needed in payment of debts, they could only convert them into money for that purpose, by resorting to a Court of Chancery. The slaves, therefore, were clearly equitable, and not

legal assets, in the hands of the executors: W'ms on Ex'rs, 1033; *Hughlett* v. *Hughlett*, 5 Hum., 469.

In the case last cited, *Hughlett* v. *Hughlett*, a testator had directed his executors to sell personal and real estate, for the payment of his debts. The executors had executed a joint bond, and therefore were responsible for the acts of each other, so far as the personalty was concerned, but as the County Court had no power under the act of 1813, to take a bond from executors, for the faithful performance of their duties, except in administering the legal effects of their testator's estate, there was no mutual liability created by the bond, as between the executors in relation to the equitable assets. Much more clearly would these consequences follow in the case before us, inasmuch as the will of the testator confers no power and imposes no duty, on the executors, which requires them to sell either land or slaves for the payment of his debts. The only power or duty conferred or imposed upon them is, that if the personal effects to be administered, should be insufficient to pay the debts, then they should be authorized by implication of law, to apply to a Court of Chancery, to subject such of the slaves as might be required to pay the debts. The testator indicates in his will no doubt as to the sufficiency of his personal effects, including the crop of 1856, to pay his debts, and hence he makes no provision for such contingency. If such contingency actually occurred, and the executors applied to the Chancery Court for the sale of slaves, they did not and could not do so in pursuance of the directions in the will, but in pursuance of their duties as executors under the

law to have the debts paid. Their undertaking, as executors, was to apply the legal assets to the payment of the debts. As held by Judge Turley, in the case of *Hughlett* v. *Hughlett*, the word "executors" is a technical term, and applies to duties to be performed in relation to the goods and chattels, rights and credits of the testator in contradistinction to that of trustee, which applies to duties to be performed in relation to real estate;" and since the decision in *Savage* v. *Hale and Coggin*, 1 Sneed, 365, we may add, in relation to slaves.

The result is, that the executors were acting in a double capacity, as executors in regard to the legal assets, in pursuance of the duties imposed by the will, and as trustees in regard to the equitable assets, but without having their trust imposed by the will. Having given a joint bond, they were mutually liable for their acts as executors, but individually and severally, liable for their acts as trustees: 2 W'ms on Ex'rs, 1652; *Hughlett* v. *Hughlett*, 5 Hum., 469; *Deaderick* v. *Cantrell*, 10 Yer., 268.

It is not denied in the argument, that all the money derived from the sale of the slaves, from their hire, and from the rents, for which it is sought to hold Bright responsible, was in fact, received by Jno. S. Fulton. Nor is it controverted, that as a general proposition, when there are two or more trustees, who have entered into a joint bond, they are not responsible for acts done or moneys received by each other, unless the liability is fixed by facts and circumstances which show that the acts done, or moneys received by

one, were consented to and approved by the others. But it is insisted, that the facts and circumstances fix upon Bright a legal responsibility, although the moneys were received by Fulton.

It may be proper here to refer to the bill, under which the proceedings were had, which resulted in a decree for the sale of the slaves. The bill was filed on the 4th of February, 1867, by R. A McDonald, John M. Bright, and John S. Fulton, Executors of James Fulton, deceased, and all the adult legatees and devisees, except Martha Davidson, who was made a defendant, as were also the minor legatees and devisees. Jno. M. Bright and Jno. S. Fulton were the solicitors who filed the bill. Complainants allege, that the lands and slaves would not be susceptible of an advantageous division, and that it would be manifestly to the interest of all the legatees and devisees, that the same be sold for partition. They also allege, that the testator was considerably indebted at his death, but they think it probable that the proceeds of the perishable property, growing crops, and debts owing the estate, may be sufficient to pay off said indebtedness, if the whole of the sum can be realized; in the event, however, there should be a deficiency of such effects, they wish to reserve the right of asking an appropriation of a portion of the fund, for the payment of such deficiency. The answer of Mrs. Davidson concurs in the correctness of the allegations of the bill, and the minors by their guardian *ad litem*, Robert Farquharson, answer formally.

The *ex parte* affidavits of R. A. McDonald and Jno.

S. Fulton, were taken by the Clerk and Master, as to the necessity of selling negroes to pay debts, and they state that it may be necessary to reserve about $10,000, though they say it may not be required; they do not think it will all be required.

The proof as to the impracticability of dividing the land and slaves, was abundant.

It is manifest that the real object of the bill was, to obtain a decree of sale of the land and slaves for distribution, and not for the payment of debts. Neither the allegations of the bill, nor the proof, would, at that time, have authorized a decree of sale of any portion of the slaves for the payment of debts. But the proof was sufficient to authorize a sale for partition, and such a decree was made, directing the Clerk and Master to make the sales, and to take the notes payable to himself. Upon the making of this decree the court took charge of the further execution of the trusts, and the executors, as such ceased to have any further connection with, or control over, the proceeds of the sales. When the court ordered, that ten thousand dollars of the proceeds of the sale of these slaves, should be reserved by the Clerk and Master, from distribution, and be held subject to be applied, if necessary, by the executors in payment of debts, they could not receive the fund in their character of executors, but as trustees or receivers of the court. In this capacity they were not bound to accept the trust, and if they did, they would be responsible only for their individual acts, except upon the law which governs the liability of co-trustees for the acts of each other. The fact that the court designated them

as executors, in the decree, could not clothe them with the duties and responsibilities of executors, under the bond which they had executed.

But it is insisted, that when the Clerk and Master sold the slaves, and reported that $10,000 had been reserved for the executors, as well as when he reported that the $10,000 had been paid over to the executors, and that he had taken their bond with security, Jno. M. Bright drew the several decrees, ordering the money to be thus paid over, and confirming the report of the Clerk and Master, stating that it had been paid over to the executors, and therefore that he is estopped from denying his liability; although the proof shows, that in fact, the money was paid only to John S. Fulton, one of the executors, and his receipt alone taken for it, and his bond alone, if any, executed to the Clerk and Master.

The fact that Mr. Bright, as solicitor, drew the decree, ordering the Clerk and Master to reserve $10,000 of the funds, and pay it over to the executors, could have no other effect, than to fix upon him knowledge that such an order had been made, and to furnish presumptive evidence that he was willing to accept the trust.

But the decree confirming the report of the Clerk and Master, made at the August Term, 1860, in which the Master reports that he had paid over to the executors $10,000 of the proceeds of the sales of slaves, and $2,303 derived from their hire, which decree was in the hand-writing of Mr. Bright, is mainly relied on to fix his liability. The Clerk and Master reports,

that he has paid "to the executors, J. S. Fulton and others, $10,000," and that "he has paid to the executors of James Fulton $2,303.40, the hire of the slaves." The report proceeds: "For all payments above reported, the undersigned has taken and filed proper receipts; but before making payments to any executor, administrator or guardian, he caused them to give bond according to law; which bonds, together with said receipts, accompany this report."

Then follows the decree of confirmation, as follows: "To which report no exceptions being taken it is in all things confirmed."

It is argued, that as Mr. Bright drew this decree of confirmation, it is an admission that the amounts reported by the Master were received by the executors, by which he is estopped. In *Heane* v. *Rogers,* 9 B. & C., 577, it is laid down, that, "the express admission of a party to the suit, or admissions implied from his conduct, are strong evidence against him; but he is at liberty to prove that such admissions were mistaken or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his condition." It is observed that while the decree recites that the $10,000 was paid over to the executors; yet the accompanying receipt, which is part of the decree, shows that the recital was erroneous, and that it was paid to Jno. S. Fulton only. The error or mistake in the recital, therefore, can not estop Mr. Bright from showing by the decree itself, that it was a mistake, and that he was led into it by the erroneous statement on the face of the report of the

Clerk and Master. It is evident that the Clerk and Master misapprehended the character in which John S. Fulton was acting in receiving the money. He went upon the supposition that the money was being paid to Fulton, as one of the executors, and that his receipt of it was the receipt of all the executors. Hence he reported it as paid to the executors, when his receipt showed that it was paid to John S. Fulton alone. It is equally evident that Fulton misapprehended the character in which he was receiving the money, for we find that in his settlement with the County Court, in June, 1860, he charges the money received to all the executors. On this settlement, made by John S. Fulton alone, there was a balance found against the executors. This balance was the residue of the $10,000, after deducting disbursements. In June, 1861, John S. Fulton made another settlement with the County Court, in which the accouut was stated between himself alone as executor, and the estate of his testator. In this account he charges the balance to himself and not to the executors. This settlement was made shortly before he entered the army in which he was killed. We may fairly presume, that this settlement was made in view of his being about to enter the military service, and that he might leave a record of his own liability for the $10,000, and to show that his co-executors were not responsible for it. It shows not only that his co-executors were under no liability for this fund, on account of having joined with him in receiving it, but that he alone was chargeable with it, as far as he could make himself responsible by an ad-

mission of record, that the money was in his hands: 2 W'ms on Ex'rs, 1655; 4 Ves., 608; 1 Sch. & Leffr., 341; 1 Dev. & Battle, 336; 1 Ired Eq., 93-7; J. C. R., 295; 10 Yer., 268; 10 Peters, 234.

It is argued, however, that an agreement was entered into among the three executors, by which each one undertook to execute specific duties in carrying out the trusts of the will, and that this agreement made each one liable for the acts of the others. The proof as to such an agreement is entirely unsatisfactory. One witness has an impression that he heard Jno. M. Bright say something that indicated that there was some sort of agreement. Another says that there seemed to be a sort of tacit agreement, that Bright was to attend to the law business, Fulton to take charge of the finances, and McDonald to attend to the out-door business of the estate. But what were the specific terms of the agreement, to what extent, if any, they were to be liable for each others acts, or whether the agreement referred to their acts as executors under the will, or as trustees under the appointment of the court, the proof wholly fails to show. We can, therefore, make no inference from this vague and uncertain agreement as to a joint liability. But it is insisted, that although there might be no joint responsibility of the executors for equitable assets that came into their hands as trustees, and not as executors, as the law stood before the act of 1838, c. 111, s. 18; yet, that after that act, the executors would be jointly liable for the acts of each other, as well in regard to equitable as to legal assets. That act was intended to make executors and

their securities responsible for the administration of the trusts imposed by a will, whether as to legal or equitable assets, in the same way and to the same extent as administrators and their securities were liable before its passage. The equitable assets must arise under trusts prescribed by the will, and not be such as arise from trusts imposed by the court, and not by the will. If James Fulton had directed his executors to sell his lands or slaves for the payment of debts, or for distribution, and they accepted the trust, and entered into a joint bond, they and their securities, under the act of 1838, would be responsible for the acts of each of the executors, in the disposition of the equitable assets arising from such sales. But as no such trusts were imposed upon the executors by the will as made, the act of 1838 has no application to the case.

The result is, that as to the proceeds of the sale of the slaves and of their hire, and of the rents of the lands there was no joint liability assumed by, or resting upon, the executors; but that the liability rested on John S. Fulton only, as trustee or receiver, as he only, received the funds arising from these sources.

But in holding that John S. Fulton alone was responsible for these funds, we do not think that he was guilty of a *devastavit* in receiving them from the Clerk and Master. The proof shows that he received them as a trustee, or receiver, under the orders of the court. It is evident that he misapprehended the character in which he was holding the funds, and it is not improbable that the court labored under the same

misapprehension as to the legal effect of the order directing the funds to be paid over to the executors. But, however that may be, the legal effect of the order was to authorize the persons filling the description of executors of James Fulton, to receive the funds as trustees or receivers of the court. When John S. Fulton accepted this trust, he became thereby an officer of the Chancery Court. Instead of carrying these funds into the settlement of his accounts as executor with the County Court, his report ought to have been made to the Chancery Court. But the funds were rightfully in his hands, and the fact that he made the mistake of accounting for them in the County Court, furnishes no evidence of a *devastavit.* It does furnish evidence, however, that in June, 1861, when he made this settlement, he was responsible for so much of those funds as had not been applied in payment of the debts of the estate. He had the right to continue to hold the residue of the funds for the purpose of paying other debts, and he could not be chargeable with interest thereon, unless it should be shown affirmatively that he converted it to his own use, or that he made interest upon it, or that he failed through negligence to apply it in payment of debts. The proof shows no such case for charging him with the interest: 7 Yer., 172, 213.

The proof shows, that under the decree for the sale of the lands, the first sale took place on the 22d of October, 1859, the second on the 18th of August, 1866, and the third on the 8th of August, 1867. A question arises as to the responsibility of the executors,

for the rents of the lands after the year 1856, and until the final sale in 1867. After the year 1856, the executors ceased to have any authority under the will to control the lands. Of course, then, as executors, they are under no liability growing out of the renting of the lands. The law imposed no duty of this kind on them as executors. The proof, however, shows that some portions of the real estate were occupied by members of the family, and that other portions were rented out by John S. Fulton. So far as any portion of the lands were occupied by members of the family, they would be liable to account to the estate for a fair annual rent; and so far as John S. Fulton undertook to rent out any of the lands, he would only be responsible for the rents actually received; and if he occupied any of the lands himself, he would be accountable for reasonable rents; and if any of the other devisees rented from him, and are in arrears for their rents, they are liable to account for the same according to their contracts with John S. Fulton; and if any of the lands were unoccupied, no liability therefor would rest upon John S. Fulton. These are the necessary results of the failure of the testator to require his executors to control the lands after 1856. It appears from the proof, that at the sale of the lands in August, 1859, John S. Fulton purchased a large quantity of the lands, and executed his note therefor with security; and upon his failure to pay therefor, the lands, by a decree of the court, were re-sold; and that at the re-sale, the lands failed to bring an amount sufficient

to satisfy the notes executed by him, with interest thereon. It follows that his estate and his securities, are liable for the deficiency to the estate of James Fulton.

As it does not appear that there was any want of diligence in the collection of the note of Todd & Steele, the executors will not be responsible, if the same should be lost.

It appears in the record, that the question of compensation to John M. Bright for his services as solicitor, was referred to the Clerk and Master, who took proof and reported that $2,500 would be a reasonable compensation. The proof shows an amount of services, not only in the cause commenced for the sale of the land and slaves, but in other suits in which the estate was involved, which might have entitled him to a larger compensation than that reported by the Clerk and Master. But it is insisted for the legatees, that he ought to be allowed no compensation, on account of a loss sustained by the estate in consequence of a professional mistake made by him in filing the original bill for the sale of the lands and slaves. The mistake relied on, consisted in his making the minor legatees complainants, instead of defendants to the bill. It appears that a decree of sale was made under the original bill, that the sale took place, and that afterwards some of the parties in interest becoming suspicious of the validity of the sale, carried the case to the Supreme Court, where the case was remanded for the filing of an amended bill, making the minor legatees defendants, instead of complainants. It

is said, that, in consequence of this appeal and the remanding of the cause, it became necessary to have another decree of sale, under which the property sold for a less price than at the former sale. Hence it is earnestly argued that the estate sustained a loss in consequence of the professional error of the solicitor, for which he ought to forfeit all compensation.

The argument rests upon the assumption that the Supreme Court, in two cases, one decided in December, 1855, and the other in April, 1856, had decided that it was error, in filing bills under the act of 1827, c. 61, to make minors complainants, instead of defendants; and that it was culpable oversight in Mr. Bright, not to have known of these decisions. But upon examination of the cases referred to, it is found that neither of them bears out the assumption upon which the argument is rested. In the case of *Elliott* v. *Cochran*, 2 Sneed, 468, decided at December Term, 1855, Judge McKinney held (Judge Caruthers dissenting) that, in a proceeding under the statute of 1827, by the personal representative, the parties interested in the subject matter, and in whom the title is vested, must be made parties." The only question in the case was, whether a bill, under this statute, filed by the executor or administrator alone, without making the distributees or legatees parties, could be maintained. But whether minor distributees or legatees should be made complainants or defendants, is not decided or alluded to. In the case of *Cheek* v. *Wheatly*, 3 Sneed, 494, decided at April Term, 1856, it is held that the title to slaves vests in the distributees

of an intestate, and not in the administrator, under the act of 1827. No allusion is made in the opinion as to making minor distributees complainants or defendants. In point of fact, it was not until the December Term, 1857, that the Supreme Court decided that "in all cases in equity where it is sought to affect the interests of infants, and more especially their interests in real estate, by an attempt to charge it, or to make partition or sale thereof, the infants ought to be made defendants." This decision was made more than a year after the filing of the original bill by Mr. Bright, in the case before us. Nor was it held in the case alluded to: *Davidson* v. *Bowden*, 5 Sneed, 129, that purchasers at a sale of land and slaves, made under a decree rendered in a case in which minors were made complainants, instead of defendants, would not get a good title. It was only held that the making of infants complainants in such cases, instead of defendants, was error, for which, upon appeal or writ of error, the decree would be reversed. But in the case of *Winchester* v. *Winchester*, 1 Head., 460, it was decided, E. H. Ewing, Special Judge, delivering the opinion, that "it would be going too far, after what has already been shown, to declare a proceeding by a petition, under the act of 1827, void." It follows that the decree of sale, under the original bill filed by Mr. Bright, was not void, but that the purchasers at the sale, under that decree, would have had good titles, if the report of sales had been confirmed, either under the proceeding by the original bill, or under the proceeding by the

amended bill. The filing of the original bill, making the infants complainants, under the circumstances, was no such professional oversight, or dereliction, as could either detract from the professional standing of the solicitor, or in any degree affect his right to compensation.

But it is argued that the estate was greatly damaged by the delay in procuring a sale of the lands and negroes, and that this delay was the result of the error of Jno. M. Bright in not making the infant legatees defendants to the original bill. Upon looking into the action of this court, at its December Term, 1856, upon the original case, which was brought here by writ of error at the instance of the defendants, we find that the only question presented to the court was, whether the infants ought not to have been defendants instead of complainants. The decree in the case shows that the court declined to decide the question, but remanded the cause to the Chancery Court to be amended and proceeded in, and taxed the parties who brought the case here by writ of error with the costs. Up to that time, therefore, the Supreme Court had declined to reverse a decree for such an alleged error. But the real error which caused the delay was in the action of the Chancellor in setting aside the sales when the case was returned to his court. It was remanded and not reversed; it was remanded that the bill might be amended; not that the decree should be vacated and a new bill filed. Nothing was required but to shift the position of the infants, to have a guardian *ad litem* and a confirmation of the first sales. The delay resulted from the action of the Chancellor, and for this the solicitor could not be held responsible.

Nor does the fact that Jno. M. Bright was executor, as well as solicitor for the estate, interfere with his right to compensation as a solicitor or counsellor. Every executor or administrator has a right to procure the necessary legal counsel in administering his trust, and to pay reasonable compensation therefor out of the assets of the estate. If the executor or administrator is himself an attorney at law, he may either employ other counsel or he may give to the business his own professional services. In the latter case, he is entitled to the same compensation which he would have paid to another attorney in the former case. There is no incompatibility in the two offices of executor and solicitor. He is entitled to just remuneration for the value of his services in both capacities, to be ascertained by proof. This proposition is true and applicable as well to Jno. S. Fulton as to Jno. M. Bright in the case before us. We are satisfied that the proof fully sustains the allowances reported by the special commissioner as to the compensation of the executors as such, and of the solicitors, Jno. M. Bright and Jno. S. Fulton, as such.

It appears from the record that the County Court, upon a settlement made by the executors in 1859, allowed as part compensation for their services $2,000, of which Jno. M. Bright received $500, R. A. McDonald $500, and Jno. S. Fulton $1,000; the two former agreeing to accept no further compensation. In addition to the allowance of $1,000 to Jno. S. Fulton so made, the special commissioner allowed him $1,250 for further services.

Assuming that $1,000 was a fair compensation for

the services rendered by Jno. S. Fulton up to the time that allowance was made, and in view of the fact that his services as executor had then nearly ceased, we are of opinion that an additional allowance of $500 would be reasonable and proper.

The record shows that Robert Farquharson was appointed special commissioner by the Chancellor for the sale of the land and slaves, and that he discharged the duties of his appointment by selling the property under both sales; and as such commissioner took the notes of the purchasers, made collections and disbursements under the orders of the court, and acted as trustee for loaning out the funds belonging to three of the infant legatees. Several questions are raised as to his liability, in specified cases, and as to the compensation to which he was entitled, which we are required to determine.

He would be liable, in general terms, for all the sale notes taken by him, and for all moneys collected by him, together with interest actually received when the notes have been collected, and the interest actually due on sale notes or judgments not collected. To discharge himself he must show how he disposed of the several notes and how he has applied the moneys received, together with all interest actually received by him and due from him.

It is shown that he received from the sale of slaves a fund amounting to about $11,000, which belonged to three of the minor legatees who had no guardians. He was appointed trustee for these infants, and was ordered to loan out the fund on good securi-

ty. The proof shows that he loaned out several thousand dollars of this fund to Jno. S. Fulton without security. Although it appears that Fulton was at the time entirely solvent, yet it was loaned in violation of his duty, and he is therefore chargeable with the amount and interest. But the record shows that whilst the three minors had no guardians, Jno. S. Fulton furnished to them necessary supplies, amounting to over $2,000, which was reported to the court and the expenditure approved and sanctioned, and an order made that the amount should be paid to him by their trustee. This amount, with interest, is properly a credit on the amount due from Jno. S. Fulton to the trustee for the funds loaned without security. The trustee, therefore, will only be chargeable with the residue, after allowing this credit.

As the first sale of the land and slaves was set aside, a question is made as to the amount of compensation to which he is entitled. This is governed by the statute which was in force at the date of the sale. It is not a matter of discretion under the act of 1855, c. 264, s. 3, but is fixed definitely at $75.

It appears that the second sale of the slaves was made on the 4th of January, 1858, when the notes of the purchasers due at twelve months, were taken. The act of 1855 was then in force, and governed his compensation as to the simple duty of selling and taking notes. But on the 8th of March, 1858, an act was passed, changing the amount of compensation to be allowed to clerks and masters and special commissioners. This act was carried into the Code as sections 4551

and 4552. By this act it is provided, that "when the amount of the sale shall exceed the sum of $6,000, the court may make such additional allowance as may be deemed just and reasonable, provided it shall not exceed two per cent. upon the whole amount of sale." This law governs the compensation to be made for the collection and disbursements of the notes taken upon the sale of the slaves and for the sale of the lands, and taking the notes and collecting and disbursing the same. In view of the fact that the compensation allowed for the first sale is regarded as entirely inadequate for the amount of work shown to have been done, we can not say that the allowance of two per cent. on the amount of the several sales of land and slaves, reported by the special commissioner, was unreasonable. In like manner we concur with him in regarding the allowance of $115 as reasonable for collecting and disbursing about $2,300 from the hire of slaves. This allowance, as well as the allowance of $1,500, for keeping and saving notes belonging to the minor legatees, amounting to about $11,000, during the perils of the war, is fully sustained by the proof, and is therefore proper.

The special commissioner, Farquharson, is entitled to have the several amounts of commissions and allowances, with interest, credited upon the amount for which he may be found liable as already indicated. But as to the $10,000 and the $2,300 paid over to John S. Fulton by order of the court, the special commissioner incurred no liability for failing to take security, as he was not required to do so by the order of the court;

and as the proof abundantly shows that at that time John S. Fulton was entirely solvent.

In the view we have taken of the law and the facts in proof, John S. Fulton acted as a receiver and officer of the court in receiving the proceeds of the sale and hire of slaves, and in renting out the real estate. In that capacity, the law attaches to him no liability to account for interest, unless it is shown that he converted the funds in his hands as receiver, to his own use, or that he made interest upon the funds, or that he failed to account for them, when properly demanded.[1]

The record furnishes no evidence that he incurred the liability to account for interest on either ground. The proof shows that he kept a private record of his transactions and doings as such officer of the court. This was, no doubt, intended by him to be used in making his report and settlement with the court, and with the other beneficiaries. It is therefore to be taken as evidence as to his conduct in the execution of his duties as receiver. The circumstances satisfy the court that he acted with fidelity and integrity in his conduct as receiver, and that nothing but his connection with the civil war, and the loss of his life thercin, prevented

[1] In the case of *Thos. M. Andrews et als.* v. *John T. Andrews*, decided on the 22nd day of February, 1871, the court said of an exception taken by a guardian to an account: "Defendant excepts because he is charged with interest during the existence of the war. This exception is not well taken. He does not show that he made no interest and could make none. We can not presume, because a war existed, that the funds in his hands were not drawing interest." * * * * * * "Because the master has compounded interest during the war. For the reason already stated, in regard to a former exception, this exception is not well taken."

him not only from rendering a satisfactory account to the court and the other legatees, but also from paying over the funds which came into his hands in the discharge of his duties as receiver. He is therefore liable to account for the funds so coming into his hands, but without interest, and he will be credited with compensation for his services as receiver in addition to the allowance made to him by the County Court as executor. It appears from the proof that ten per cent. on the amount of rents actually received by him would be reasonable. This was allowed by the special commissioner. and we see no reason to disturb his report in that respect.

A question has been discussed as to the appropriation of the share of John S. Fulton in the estate of his father, James Fulton. We have already seen that upon a re-sale of the lands purchased by Jno. S. Fulton, they fell short of satisfying the original notes executed by him with security for the lands. He is therefore indebted to the estate in a considerable amount, on account of this deficiency. It also appears, that upon taking the account of his transactions as executor and receiver, he will be found considerably in arrears to the estate. The question is, to which indebtedness shall his share in the estate be applied? It is a rule sanctioned by authority that when a debtor owes two distinct debts to the same creditor, and makes a payment, if there is no contract controlling, the debtor may elect to which debt the payment shall be applied. If no election has been made, and it devolves on the court to make the application, the rule is to apply

the payment to the debt which rests heaviest on the debtor, or to the debt which is of oldest date: *Bussey* v. *Gant*, 10 Hum., 238; Domat, § 2282; 4 Mass., 333, and 5 Mass., 82.

For the satisfaction of the amount which may be found due from John S. Fulton upon the balance on the purchase of land, his interest in the estate of Jas. Fulton, deceased, will be first appropriated.

As the appeal in this case was taken before the final report ordered by the Chancellor to be made, after the several exceptions had been passed upon, we deem it unnecessary to do more than to remand the cause, that the special commissioner may make his final report to the Chancery Court, in doing which he will be governed by the directions given and principles settled in this opinion.

On account of the large amount involved in this cause, and the great interest which has been manifested in its investigation by the counsel, we have given to the immense record before us a laborious examination, and have arrived at the results already announced.

In this examination, we deem it not improper to state, that we have been gratified to find in it nothing which casts the least imputation upon the characters of any of the parties, either the dead or living, for strict integrity and honesty. Whatever losses have occurred can be easily traced to the unavoidable casualities of the late protracted civil war. If the chief actor in the settlement of the estate had survived the war, we have every reason to suppose, from his high character for

integrity and fidelity as exhibited in the record, that but little if any loss would have occurred. It is highly probable, from all the circumstances, that, with him perished most of the funds, the absence of which constitutes the great body of the real loss.

The cause will be remanded to be proceeded in according to the directions indicated in this opinion.

Mr. WADE presented a petition for re-hearing, reviewing the conclusions of the court:

First—On the construction of the act of 1837–8, c. 111, s. 18, and citing the cases of *Lester* v. *Vick*, 2 Heis., 476, and *Porter* v. *Moores*, MS.; Code 2342, 2352.

Second—On the duty of executors in regard to the sale of slaves.

Third—On the doctrine that slaves were equitable assets.

Fourth—On the time of the decision that minors must be defendants, citing 1 Swan, 75.

Fifth—On the effect upon a sale of error in making minors defendants, citing 11 Hum., 489.

Sixth—On the conclusion that the executors were not liable for rents on their bond, by act of 1837–8, c. 111, s. 18.

Seventh—On the allowance of 10 per cent. commission on rents, accounted for when $6,000 of rents out of $12,000 remain unaccounted for, citing *M. & A., of Winchester* v. *Slatter*, 2 Heis., 65.

Eighth—On the allowance of commissions on $132,000 of proceeds of sales, when all but $20,000 of this

fund was purchased by beneficiaries, and not received or collected or disbursed by the commissioner, and cited 11 Hum., 323.

Ninth—On allowing any compensation to R. Farquharson for taking care of the funds of the infants when a large sum was lost by his failure to take security.

Tenth—On the allowance of fees to J. M. Bright on behalf of the infants, when the adults should be charged with all—they being the proper complainants whom he represented.

Eleventh—On the allowance of fees as to slaves, &c., held to be equitable assets, and so not in their hands as executors.

A. S. MARKS submitted an argument on the petition, and insisted that R. Farquharson could have no active relief on the Todd note, because he did not appeal: citing Code 3151, 2970; *Gilchrist* v. *Cannon*, 1 Cold., 581.

Second—That he ought to have no compensation, as he was not charged with interest and has not performed his whole duty: 2 Heis., 65.

Third—That commissions are erroneously allowed on money not "collected and paid over," commenting on 11 Hum., 323, and the Code.

Fourth—That no commissions ought to be allowed on re-sales; a means of collecting former bids.

Fifth—That costs and commissions ought not to bear interest.

Sixth—That counsel fees ought not to bear interest.

Seventh—That the beneficiaries ought not to be charged with costs.

John S. Fulton *et als.* *v.* John M. Davidson *et als.*

JOHN C. BROWN, in answer to the petition for re-hearing and brief, insisted that the decision is in harmony with *Lester* v. *Vick*, and *Porter* v. *Moores*. He contested the fact as to the loss of funds by Farquharson. Insisted that the infants must contribute to the solicitor's fees for obtaining sales of negroes and lands. Insisted that Code 3151 applied, where there was judgment against several, with appeal by one or more—not to a general appeal by all of the complainants. That the case, in 11 Hum., does not hold the rule claimed. That it was decided before discretionary power, was conferred by the Code 4552. That commissions on re-sales stood on the footing of commissions on original sales, but if not, they were allowable under Code 4552. Admitted that costs did not bear interest, but commissions were to be retained out of the fund, and so should be credited at the date when they might have been retained. So of solicitor's fees. This would be equivalent to allowing interest.

Re-hearing refused, March 10, 1871.

Wm. B. Andrews *v.* Henry Page *et als.*

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Wm. B. Andrews *v.* Henry Page *et als.*

1. Emancipation. *Proclamation of, void.* The Emancipation Proclamation of A. Lincoln was an unconstitutional and void act.

2. Same. *By Constitution of* 1870. Slavery was unquestionably abolished in Tennessee by the Constitution of 1870, if it was not effectually and properly done by the Constitution of 1865.

Cases cited: *Nelson* v. *Smithpeters*, 2 Cold., 14; *Graves* v. *Keaton*, 3 Cold., 14; *Gholson* v. *Blackman*, 4 Cold., 587; *Wharton* v. *The State*, 5 Cold., 3, 4; *Keith* v. *State*, *Ib.*, 38; *Bedford* v. *Williams*, *Ib.*, 210.

3. Slaves. *Rights of, in Tennessee.* Review of the cases on the rights of slaves in Tennessee before emancipation.

Statutes cited: 1813, c. 56; 1835, c. 19; 1839, c. 7; 1799, c. 9, s. 1; 1829, c. 23, s. 2.

Code cited: 3808, 3809, 4597.

Cases cited: *Britain* v. *State*, 3 Hum., 203, 204; *Loften* v. *Espy*, 4 Yer., 92; *Henderson* v. *Vaulx*, 10 Yer., 38; *Dement* v. *Scott*, 2 Head, 367; *Huggins* v. *Moore*, 3 Head, 426; *Traynor* v. *Johnson*, *Ib.*, 44. Cases cited in 1 Meig's Dig.: 454, 459; *Harris* v. *Clarissa*, 6 Yer., 240; *Fisher's Negroes* v. *Dabbs*, 6 Yer., 157; *Hartsell* v. *George*, 3 Hum., 255; *Greenlow* v. *Rawlings*, *1 b.*, 90; *Hope* v. *Johnson*, 2 Yer., 123; *David* v. *Bridgman*, 2 Yer., 558; *Jacob* v. *Sharp*, Meigs, 114; *John* v. *Tate*, 7 Hum., 388; *Elias* v. *Smith*, 6 Hum., 33; *Hinklin* v. *Hamilton*, 3 Hum., 569; *Lewis* v. *Simonton*, 8 Hum., 185; *James* v. *The State*, 9 Hum., 308; *Isaac* v. *McGill*, *Ibid*, 616; *Jane* v. *Hagan*, 10 Hum., 332; *Lewis* v. *Daniel*, 10 Hum., 305; *Jones* v. *Arterburn*, 11 Hum., 97; *Ford* v. *Ford*, 7 Hum., 92, & S. C., 11 Hum., 89; *Boon* v. *Lancaster*, 1 Sneed, 577; *Abram* v. *Johnson*, 1 Head, 120; *Jones* v. *Allen*, *Ib.*, 626; *McCloud* v. *Chiles*, 1 Cold., 248; *Porter* v. *Blakemore*, 2 Cold., 556; *Stephenson* v. *Harrison*, 3 Head, 732, 733.

4. Same. *Marriage of.* The relation of husband and wife among slaves was recognized in Tennessee.

Statutes cited: 1715, c. 31, s. 6; 1778, c. 5, s. 1; 1778, c. 7; 1787, c. 6, s. 3.

Cases cited: *Hartsell* v. *George*, 3 Hum., 255; *Edwards* v. *McConnell*, Cooke, 313.

5. Marriage. *Form of.* The act of 1778, c. 7, and the act of 1741, c. 1, s. 7, do not expressly annul or prohibit marriages in the common law form.

Cases cited: *Bushaw* v. *State*, 1 Yer., 177; *Grisham* v. *State*, 2 Yer., 589; *Johnson* v. *Johnson*, 1 Cold., 630; *McCorry* v. *King's heirs*, 3 Hum., 273.

Case disapproved: *McReynolds* v. *State*, 5 Cold., 20.

Wm. B. Andrews *v.* Henry Page *et als.*

6. CONSTITUTIONAL LAW. *Laws legitimating marriages.* The power to validate marriages and legitimate children by general laws, exists in the Legislature of this State, and the act of 26th of May, 1866, legitimating marriages of slaves is valid.

7. SLAVES. *Children of, legitimate. Inheritance.* The children of slave marriages were legitimate and were capable of inheriting by act of 1866.

8. SAME. *Freedom. Purchase of a slave for a wife.* The purchase by a freeman of a slave for a wife gave her an inchoate right to freedom, which it only required the assent of the State to perfect, and this assent was given by the general emancipation.

9. SAME. *Same. Relation.* The rights of freedom upon this assent relate to the time the inchoate right was acquired.

10. SAME. *Same. Rights of widow.* Dower is one of the rights which resulted from the marriage of a freeman with a slave bought by him for a wife, and emancipated after his death.

FROM SMITH.

Chancery Court at Carthage. October Special Term, 1868. B. M. TILLMAN, Ch.

J. B. MOORES, J. B. LUSTER, and W. W. WARD, for complainants.

S. M. FITE, for defendants.

NELSON, J., delivered the opinion of the Court.

On the 3rd day of December, 1867, Henry Page, a free man of color, bought of complainant three slaves, said to be his wife and two children, at the price of $3,200, and took a bill of sale from complainant. Henry paid part of the purchase money, and was to pay the residue in one, two and three years; and having absconded privately and left the country, and gone to parts unknown, as the bill alleges, this attachment bill charging that there was a balance due of $1,550, was filed against

him and others, on the 21st day of January, 1861, for the purpose of subjecting certain debts due him, and certain real and personal estate, to the satisfaction of said demand.

Attachments were duly levied by the Deputy Sheriff of Smith and the Sheriff of DeKalb counties, in the month of January, 1861.

Publication was duly made and judgment *pro confesso* entered against Henry Page and others. An answer was filed by H. Y. Riddle, B. W. Harris and J. D. White, and on the 21st day of August, 1865, the death of Henry Page was proved, and publication made as to his heirs, whose names and places of residence were said to be unknown.

Without minutely tracing all the steps preliminary to a final hearing of the causes, or detailing the various provisions of the decrees therein, it is sufficient for the purposes of this opinion to state, that on the 20th of February, 1866, a decree was rendered in favor of complainant for $2,022 75-100 and costs; and the Clerk and Master was ordered to sell the land described in the bill, and attached in the progress of the cause. The Master afterwards reported that he had failed to make sale; and at this stage of the cause, being on the 15th of August, 1866, a petition was filed in the Chancery Court at Carthage, where the original suit was pending, by Larkin Page, and seven others, representing that they are the heirs at law of Henry Page, deceased, that he died at Nashville in October, 1864; and setting forth such satisfactory causes for not having made defense to the suit, that on the 21st day of August, 1866,

the Chancellor pronounced a decree setting aside the judgment *pro confesso* and the order for the sale of the land, and giving petitioners leave to become parties defendant, and to file an answer to the original bill. To this action of the court complainant excepted.

On the 3rd day of December, 1866, an answer and cross bill was filed in the names of Dilly Page (who is described in the petition as an heir, but in the answer and cross bill as the widow of Henry Page) and others, claiming to be his heirs, in which it is alleged that they are the widow, children, grand-children, and husbands of children, of the said Henry Page, deceased; that they were emancipated by the President's proclamation; that they are entitled to the property of Henry Page by virtue of the "Civil Rights Bill;" that the said Henry had left the country in consequence of great political excitement and because of an apprehension that he and his family would be reduced to slavery, and not for the purpose of avoiding the payment of his just debts; that he at first went to Cincinnati, but afterwards returned to and died in Nashville; that most of respondents lived in Smith county, and part of them on the lands owned by Henry Page; that Henry had made various payments to complainant, and was not indebted to the amount claimed in the bill; that he owned three tracts of land, of six, seven and one hundred and ninety-six acres in Smith county, and was the equitable owner of about one hundred and twelve acres adjoining the last mentioned tract; that Dilly intermarried with Henry in 1825; that the other defendants are their children and grand-children; that the

said Dilly is entitled to dower; and they pray for assignment of dower, and all such further and different relief as they may be entitled to.

The cross bill was fully answered by W. B. Andrews, the defendant. It was shown in evidence that he was the owner of the slaves, Bill, Brit and Dilly, in the year 1857; that he sold them to Harry Page, the husband and father, for $3,200; that a settlement was made between Andrews and Harry in 1859, when it appeared that about one-half of the debt had been paid; that Harry was killed at Nashville, in a saw mill, in 1864; that he and Dilly had lived together as husband and wife for fifteen years, and were so recognized by the neighbors; that they were so living together at the time of his death, and were the parents of eleven children. Gabriel Bedford, a colored witness, aged seventy-nine years, states that he knew Harry and Dilly before they were married; that they were married nearly sixty years before his deposition was taken; that they were married "like other darkeys did in those days;" that they were slaves at the time of their marriage, but were "regarded as man and wife all the time by their neighbors." This witness also proved the number and names of their children.

This is the substance of all the evidence in the cause. The Chancellor heard the cause at October Term, 1868, and pronounced a decree in favor of the original complainant for the amount of his debt and costs; dismissed the cross bill, and ordered a sale of the property attached. He declared that Dilly was not a free woman at the death of Henry Page, in such a sense as to be en-

titled to dower at the time of Harry's death, and that Harry left no legal heirs capable of inheriting the estate. Dilly presented a petition for rehearing, in which she alleged that Harry had not purchased her for the purpose of making her his slave, but as a wife, and to make her a free woman; that she was to aid in the payment of the purchase money; fully performed her part of the agreement, and thus acquired a right to freedom at the date of the purchase. The Chancellor refused to rehear the cause, and to grant leave to amend the cross bill, so as to put in issue the allegations of the petition.

From this decree Dilly Page prayed an appeal, which was granted by the Chancellor on her taking the oath prescribed by law for poor persons, which was done accordingly. This cause has been very carefully investigated by counsel, and fully argued before us; but we feel constrained, after a careful consideration of the numerous authorities cited on both sides, to hold that there is error in the Chancellor's decree.

The rights of the parties can not be determined upon the constitution and laws as they now exist, but are to be ascertained under the constitution and laws as they existed in this State at the time of the death of Henry Page, in 1864. The emancipation proclamation, issued by Mr. Lincoln on the 1st day of January, 1863, had no effect in this State, because Tennessee was not one of the States embraced in it, as was held in *Gholson* v. *Blackman*, 4 Cold., 586, 587. That case might also have rested upon the broader and firmer ground, that the President of the United States had no constitutional authority to issue the proclamation, and that it was

issued in direct violation of the Constitution of the United States, which was then universally understoood as legalizing slavery in the States where it existed, as well as of the joint resolution adopted by Congress on the 25th of July, 1861, which disavowed all purpose of interfering with the rights or established institutions of the States in rebellion. See McPherson's History of the Rebellion, 286.

But it is needless to pursue this discussion, or to consider the 13th Amendment to the Constitution of the United States, which was intended to effect what had not been accomplished, either by the Proclamation or the results of the civil war; or to express any opinion as to the validity of the amendment itself; or of the amended Constitution of Tennessee of 1865, as the existence of slavery in this State was annihilated beyond all doubt or question, by the Constitution of 1870, which was freely and voluntarily adopted by the people.

It was repeatedly held by our immediate predecessors, that slavery in this State was abolished, by the amended constitution of 1865: See *Nelson* v. *Smithpeters*, 2 Cold., 14; *Graves* v. *Keaton*, 3 Cold., 14; *Gholson* v. *Blackman*, 4 Cold., 587; *Wharton* v. *The State*, 5 Cold., 3, 4; *Keith* v. *The State*, *Ibid*, 38; *Bedford* v. *Williams*, *Ibid*, 210. There is nothing in the case now before us which requires a review, or reconsideration of those cases, as Dilly, from the evidence was vested with the inchoate right to freedom when she was purchased in 1857, by Harry, claiming to be her husband; and the amended constitution of 1865, however informally and irregularly adopted,

was recognized by the political department of the Government, viz.: the President and Congress of the United States. See *Luther* v. *Borden*, 7 How., 1, which applies to the recognition of a State Constitution.

While the institution of slavery existed, it was generally held, in the slaveholding States, that the marriage of slaves was utterly null and void; because of the paramount ownership in them as property, their incapacity to make a contract, and the incompatability of the duties and obligations of husband and wife with the relation of slavery: *State* v. *Samuel*, 2 Dev. & Bat., 177; *Howard* v. *Howard*, 6 Jones, 235; *Smith* v. *State*, 9 Ala., 990; *Malinda* v. *Gardner*, 24 Ala., 719; Bish. on Mar. & Div., 4th ed., §§ 156, 157. But we are not aware that this doctrine ever was distinctly and explicitly recognized in this State. Before the unjust, unwarrantable, unconstitutional, and impertinent interference, of enthusiasts and intermedlers in other States with this domestic relation, rendered it necessary for the State to guard against the effect of their incendiary publications, and to tighten the bonds of slavery by defensive legislation, against persistent and untiring efforts to produce insurrection, the uniform course of decision in this State was shaped with a view to ameliorate the condition of the slave, and to protect him against the tyranny or cruelty of the master and all other persons. Wantonly to beat or abuse the slave of another, was indictable under the act of 1813, c. 56, Car. & Nic., 678. If indicted for a capital offense, and the master failed to employ counsel, it was the duty of the court to assign counsel for his defense at the expense of the master,

by act of 1835, c. 19, Car. & Nic., 683. If employed in the master's business in apparel so tattered and torn as indecently to expose the person, the master was indictable for lewdness: *Britain* v. *State,* 3 Hum., 203, 204. Slaves could be witnesses for and against each other, as well as for and against free persons of color, under the act of 1839, c. 7, Nic. Sup., 131; Code, 3808, 3809.

The willful murder of a slave, whether committed by the master or any other person, was punishable in the same manner as the like offense against a white person was punishable: Act of 1799, c. 9, s. 1, Car. & Nic., 676, 677; Act of 1829, c. 23, s. 2; *Ibid,* 316; Code, 4597.

Our Courts of Chancery often interfered to prevent their sale or removal, on the ground that "they constituted a part of the family entitled to and receiving, if worthy, the affections of the master," and because "the property in them was a property in intellectual and moral and social qualities; in skill, in fidelity, in gratitude, as well as in their capacity for labor." See *Loftin* v. *Espy,* 4 Yer., 92; *Henderson* v. *Vaulx and wife,* 10 Yer., 38. Our courts of law were ever ready to secure their kind treatment by giving damages against the hirer for bad usage, cruelty, or negligence. See *Dement* v. *Scott,* 2 Head, 367; *Huggins* v. *Ransom,* 3 Head, 426; *Traynor* v. *Johnson, Ibid,* 44. A most enlightened and liberal construction was at all times given to the statutes which authorized emancipation, and to every species of contract or agreement on that subject. See the statutes and cases cited in 1 Meigs Dig., 454, 459, and especially

the cases of *Harris* v. *Clarissa*, 6 Yer., 240; *Fisher's Negroes* v. *Dabbs*, 6 Yer., 157; *Hartsell* v. *George*, 3 Hum., 255; *Greenlow* v. *Rawlings*, *Ibid*, 90; *Hope* v. *Johnson*, 2 Yer., 123; *David* v. *Bridgman*, 2 Yer., 557; *Jacob* v. *Sharp*, Meigs, 114; *John* v. *Tate*, 7 Hum., 388; *Elias* v. *Smith*, 6 Hum., 33; *Hinklin* v. *Hamilton*, 3 Hum., 569; *Lewis* v. *Simonton*, 8 Hum., 185; *James* v. *The State*, 9 Hum., 308; *Isaac* v. *McGill*, *Ibid*, 616; *Jane* v. *Hagan*, 10 Hum., 332; *Lewis* v. *Daniel*, 10 Hum., 305; *Jones* v. *Arterburn*, 11 Hum., 97; *Ford* v. *Ford*, 7 Hum., 92, & S. C., 11 Hum., 89; *Boon* v. *Lancaster*, 1 Sneed, 507; *Abram* v. *Johnson*, 1 Head, 120; *Jones* v. *Allen*, *Ib.*, 626; *McCloud* v. *Chiles*, 1 Cold., 248; *Porter* v. *Blakemore*, 2 Cold., 556; *Stephenson* v. *Harrison*, 3 Head, 732, 733.

The numerous authorities above cited, show that slaves, although regarded as property and subject to many restrictions, never were considered by the courts of this State as standing on the same footing as horses, cattle, and other personal property. Their condition was aptly and truly described by Judge McKinney, in *Jones* v. *Allen*, 1 Head, 626. He says: "We are not to forget, nor are we to suppose, that it was lost sight of by the Legislature, that, under our modified system of slavery, slaves are not mere chattels, but are regarded in the two-fold character of persons and property; that, as persons, they are considered by our laws as accountable moral agents, possessed of the power of volition and locomotion, and that certain rights have been conferred upon them, by positive law and judicial determination; and other privileges and indulgences have been conceded to them

by the universal consent of their owners. By uniform and universal usage, they are constituted the agents of their owners, and are sent on their business without written authority; and in like manner they are sent to perform those neighborly good offices common in every community. They are not at all times in the service of their owners, and are allowed, by universal sufference, at night, on Sundays, holidays, and other occasions, to go abroad, to attend church, to visit those to whom they are related by nature, though the relation be not recognized by municipal law; and to exercise other innocent enjoyments, without its ever entering the mind of any good citizen to demand *written authority* of them. The simple truth is, such indulgences have been so long and so uniformly tolerated, that public sentiment upon the subject has acquired almost the force of positive law:" *Ibid*, 636, 637.

In the case of *Elias* v. *Smith*, 6 Hum., 33, where Elias had purchased his wife and child, and other children were born to them after the purchase; where he was clothed with the mere form of a legal title, to the end that he might be able to emancipate them; where a creditor of Elias had caused his execution to be levied upon the wife and children, and he filed a bill to enjoin the sale, Judge Reese, in delivering the opinion of the court, says: that the former owners, who intended their emancipation, "trusted, and not rashly, to the heart of *the husband and father;*" and, horror-struck at the thought that the wife and children could, under such circumstances, be treated as property, he indignantly inquires: "If Elias, stifling the voice of nature, and severing

the paternal tie, had been such a barbarian and monster as to have meditated the sale of them, for his pecuniary advantage, upon the strength of his mere legal title, is there a Chancery Court in Christendom, having jurisdiction over such a trust, which would not have promptly interposed, at their instance, and enjoined him from perpetrating against them so flagrant a wrong? And will not such a court interpose in a case little short in its enormity of that supposed, when a creditor of Elias seeks to produce the same result by an execution sale at law? Certainly it would. That much we have the power, and it is our duty to do:" 6 Hum., 35.

These cases tend to show that the relation of husband and wife between slaves, was recognized by the courts of this State; and so far as we have knowledge of the practice before Justices who, for a long period, had jurisdiction under our statutes, to try slaves for offenses not capital, the uniform rule was to exclude husband and wife from being witnesses for or against each other, just as white persons maintaining the same relations, were then excluded. By the Constitution of 1796, the laws then in force and use in North Carolina, were to continue in force in Tennessee until repealed; and by the North Carolina acts of 1715, c. 31, s. 6, and 1778, c. 5, s. 1, the common law of England, with certain exceptions, not material to be here noticed, was declared in force. And in the act of 1741, c. 1, s. 7, Car. & Nich., 450, it was declared, in substance, that no minister, or Justice of the Peace, should celebrate the rites of matrimony between servants, or between a free person and a servant, without the consent of the master or mistress, and every servant

married without such consent, was required to serve the master or mistress "one whole year after the term of service by indenture or custom, is expired."

It is difficult at this day, to determine in what sense the term "servant" was employed, or to ascertain the custom referred to in the statute, but it is certain that while slavery existed in this State, slaves were not married to each other without the consent of their owners, as a general rule. By the act of 1787, c. 6, s. 3, a free negro, or a mulatto, was prohibited, under a penalty, from intermarrying with a slave, "without the consent of his or her master, had in writing." These statutes go far to prove that the relation of husband and wife, between slaves, was a relation recognized by their owners; and the fact is notorious, that christian masters and mistresses often consented to, and were present at, the celebration of marriages between their slaves, and that the ceremony was frequently performed by white ministers, as well as by ministers of their own color. The marriage act of 1778, c. 7, Car. & Nic., 450, authorized ministers of the gospel and Justices of the Peace to celebrate the rites of matrimony between "*any two persons*," upon license or after publication of banns, without limitation as to race or color, and no good reason is perceived why, as slaves were always treated as persons, the language of that statute was not broad enough to include a marriage between slaves. A bond of but little practical utility was required, but that could have been signed by the master.

We are not aware that there was any general prevailing custom to marry slaves according to the requirements of this statute. The marriages between them were often

made by contract, as at common law, as they were often made between white persons in the early settlement of the country, and in remote districts where ministers and Justices were not always accessible. The issue of a free woman of color followed the condition of the mother, and was born free, and this principle was carried so far, that where a female slave was to be emancipated, by the cession of the master, and assent of the State, but was to be held subject to service for a definite time, and a child was born to her after such emancipation, but during her subjection to service, it was held that the child was free born: *Hartsell* v. *George*, 3 Hum., 255; *Edwards* v. *McConnell*, Cooke, 313, Cooper's ed., 237.

These cases, and other cases previously cited, establish beyond controversy, that there were circumstances under which the courts of this State recognized the relation of husband and wife, and the ties of consanguinity, as existing among slaves, as well as among free persons, and free persons of color; and we hold, that a marriage between slaves, with the assent of their owners, whether contracted in common law form, or celebrated under the statute, always was a valid marriage in this State, and that the issue of such marriages were not illegitimates. We do not hold that such marriages were followed by all the legal consequences, resulting from the marriage of white persons. From the very nature of the institution of slavery, they could be determined at the will of the owners, and the laws of inheritance were not applicable to them, for the reason that slaves could not, in a legal sense, become the owners of property; but still this marriage relation, however restricted, might, and often did,

become the foundation of legal and equitable rights of the highest importance.

The facts of this case do not demand a review of the doctrine asserted in *Bashaw* v. *The State*, 1 Yer., 177; *Grisham & Ligan* v. *The State*, 2 Yer., 589, and other cases holding that the common law mode of celebrating a marriage between white persons is of no validity in this State; and that a marriage in this State could not be valid unless performed according to the act of 1778, c. 7, Car. & Nich., 450, or the previous act of 1741, c. 1; *Ib.*, 449. There is nothing in either of those statutes which expressly annuls or prohibits marriages in the common law form, and as the common law had been adopted, also by statute, the two statutes should have been, in our opinion, so construed as to authorize a marriage in either mode. It was correctly said in *McCorry* v. *King's Heirs*, 3 Hum., 273, that "the whole body of common law, on the subject of the domestic relations, and especially the relation of baron and feme, except so far as changed and modified by statute, has been adopted among us;" and it is manifest that Judge McKinney doubted the authority of the cases in 1 and 2 Yer., from the observations made by him in *Johnson* v. *Johnson*, 1 Cold., 630.

We do not concur in the view expressed in *McReynolds* v. *The State*, 5 Cold., 20, that "the municipal law did not recognize the right of marriage between slaves;" but that opinion is unquestionably correct in holding, that if such marriages were illegal, they were made valid by the parties consenting to live and cohabit together after their emancipation, and that their so living and cohabiting together was "a legal assent to and ratification of the

marriage." The Act of May 26, 1866, s. 5, declares, "that all free persons of color, who were living together as husband and wife, in this State, while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may be hereafter acquired, by said parents, to as full an extent as white children are entitled under existing laws of the State." An act similar in principle to this, had been passed some years before, to validate marriages between white persons who had been married under license carelessly issued in blank by the clerks, and containing nothing beyond their own signatures: See Acts 1849–50, p. 397.

The power to legitimate children has been frequently exercised by the Legislature, at the instance of the father, and was delegated to the Circuit and County Courts by the act of 1805, c. 2, Car. & Nic., 499. It may be still exercised under the Code, §§ 3640, 3643. These statutes, when not interfering with vested rights, have always been permitted to have a retrospective operation. See Cooly on Lim., 372, 373, 360, 361.

The act of 1866, having been passed to ratify marriages, good, during the institution of slavery, by the prevailing usage of this State, and to create a right of inheritance conformable to such usage, and the changed condition of the slave, was in furtherance of good morals, and of the best interests of the State; and where no other rights have intervened, was eminently constitutional and proper.

In Reeve's Dom. Rel., 3d ed., 310, it is said that the common law did not consider marriages celebrated irregularly as void; and in a note by the editors, page 311, it is said: "In North Carolina, by statute, and in Tennessee, by judicial decision, a marriage not solemnized according to the existing laws before some competent person, is held to be illegal and void in respect to a prosecution for bigamy: Statutes N. C., 1715, 1741, 1778; *Bashaw* v. *Tennessee*, 1 Yer., 117; but it may be doubted whether they would extend the doctrine so far as to bastardize the issue of the marriage." It may be added in regard to the general subject considered in this opinion, that a recent author says: "That the English Parliament, by virtue of its transcendent power, may render a bastard legitimate and capable of inheriting. This same power has been claimed by the Legislatures of the United States, and except so far as Legislative acts may come under constitutional restraints against impairing the obligation of contracts, there seems no reason why they should not be uniformly upheld:" Schouler's Dom. Rel., 312. The same author remarks further, in another part of his treatise, that, "Race, color and social rank, do not appear to constitute an impediment to marriage at common law, nor is any such impediment now recognized in England. But by local statutes in some of the United States, intermarriage has been discouraged between persons of the negro, indian and white races. With the recent extinction of slavery, many of these laws have passed into oblivion, together with such as refused to allow to persons held in bondage the rights of husband and wife.

The thirteenth article of amendment to the Con-

stitution, gives Congress the power to enforce the abolition of slavery by appropriate legislation. As to persons formerly slaves, there are no acts of Congress which legitimate their past cohabitation, and enable them to drop the fetters of concubinage:" *Ibid*, 28, 29.

As it is probable in consequence of the extinction of slavery, that few cases growing out of that relation will arise hereafter, we abstain from the further discussion of the matters which have been considered, and from presenting an elaborate view of the other interesting questions which arise upon the record and have been urged in argument. On the whole case, it is our opinion, and we adjudge the law to be as follows: viz:

1. That Dilly was the lawful wife of Henry Page, the assent of the owner to the marriage and the marriage itself being established by their long cohabitation, and recognition of each other as husband and wife.

2. That, the issue born of that marriage were born in lawful wedlock, and were rendered capable of inheriting property by the Act of 1866.

3. That, in accordance with a long and uniform course of decision in this State, when Dilly and her two children were purchased by her husband, in December, 1857, she acquired an inchoate right to freedom, which needed nothing to perfect it but the assent of the State; that this assent has been effectually given by general emancipation; and that her rights as a free woman thereby relate back to the date of her purchase, and place her in the same condition as if she had then been a free woman.

4. That there is no difference between her right to

dower and the right provided by the general laws; that it is to be preferred to the right of creditors of her husband, and of course, to the right of complainant, and extends as well to the lands of which her husband was equitable, as legal owner.

5. That, after her dower is assigned, the residue of lands attached, including the interest in remainder, or so much thereof as may be necessary, shall be sold for the satisfaction of complainant's claims subject to the right of redemption.

6. That, if any part of the land shall remain unsold, the title thereto shall be vested in the children, and those representing them, of Henry and Dilly Page.

Let the decree of the Chancellor be reversed at the cost of the complainant, and remand the cause for the execution of this decree.

W. O'N. Perkins *v.* R. P. Moss, *Administrator.*

1. Book Debt. *Two years' limitation. Adm'r.* The limitation of two years, within which a book debt is to be sued on, applies as well to a suit by an administrator as by the original party to the account.

Statute cited, 1756, c. 4, s. 2.
Code, 3781, 3782.

FROM WILLIAMSON.

Circuit Court, July Term, 1868, W. H. S. Hill, J.

W. O'N. Perkins *v.* R. P. Moss, Adm'r.

J. G. WALLACE for plaintiff in error, cited act of 1756, c. 4, s. 1; *Cave & Schaffer* v. *Basket*, 3 Hum., 340.

T. W. TURLEY for defendant in error, cited Code, 3781, 3782.

NICHOLSON, C. J., delivered the opinion of the Court.

This suit was tried in the Circuit Court of Williamson county. An action of assumpsit was brought on an account by W. P. Moss as administrator of B. M. Hughes, against W. O'N. Perkins. On the trial the administrator, Moss, after making the preliminary affidavit required by the Code, offered the account book of his intestate to establish the claim on which he had sued. From the book account so offered, it appeared that the services rendered and the articles sold and delivered, were rendered and delivered, more than two years before the bringing of the suit, and exceeded $75 in amount. Defendant objected to the competency of the proof, but the objection was overruled by the court, and the book account read as evidence.

The Circuit Judge charged the jury, that, under the book debt law, the plaintiff, as administrator, could introduce the book of his intestate in evidence to prove the account for any length of time, and for any amount—that the provisions of the Code restricting such evidence within two years, and to a sum not exceeding $75, has no application to administrators and executors. The jury returned a verdict for the plaintiff for $156. The defendant appealed in error to this court.

The admission of the book account and the charge

of the court on the evidence were erroneous. The two sections of the Code, 3781 and 3782, are to be construed together. In the original statute, 1756, c. 4, s. 2, from which they are brought into the Code, they constitute but one section. The limitation as to time and to amount, was intended to apply to the plaintiff's book of accounts, as well when the same is offered by an administrator or executor, as when offered by the plaintiff himself. No reason can be conceived why the book account of an intestate or testator should stand on any higher ground than that of a living plaintiff. The Legislature intended to make no such distinction. The judgment is reversed, and the cause remanded.

BRIGGS & BRO., *Pl'ffs in Error* v. MONTGOMERY & CO.

1. ACCOUNTS. *From another county or State. Set-off or recoupment.* Where an account comes from another State properly proved by the affidavit of the party, a set-off or recoupment may be pleaded without being sworn to.

   Code construed: 3780, 1819, c. 25, s. 1.

   Cases cited: *Cave* v. *Baskett*, 3 Hum., 340; *W. & A. R. R. Co.* v. *Mead*, 4 Sneed, 108.

2. RECOUPMENT. *Damage by leakage.* If a plaintiff ship oil in unseasoned casks whereby it is lost, the consignee, on being sued for the price may recoup the damages from the loss of the oil.

FROM WILLIAMSON.

Error to the Circuit Court. Judgment at August Term, 1868. W. H. S. HILL, J., presiding.

Briggs & Bro., Pl'ffs in Error *v.* Montgomery & Co.

J. G. WALLACE, for plaintiff in error.

R. M. EWING, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

In March, 1867, Briggs & Bro., of Franklin, Tennessee, wrote to Montgomery & Co., at Louisville, Kentucky, ordering five barrels of coal oil, and one barrel of lubricating oil. The articles were immediately shipped by boat, the shippers taking the receipt of the boat, acknowledging that the oil was shipped in good order and condition. The articles were not delivered at Franklin until the expiration of twenty nine days, whereas they ought to have gone in seven days. When the barrels reached Franklin, they were leaking, the staves shrunk, and most of the oil gone. Briggs & Bro. refused to receive the barrels, except at the quantity of oil then left in them. The agent of the railroad company declining to deliver them on those terms, they remained at the railroad depot for about two months. Briggs & Bro. agreed with the railroad company to submit the question of the liability of the road to two arbitrators, who decided that, for the detention of the barrels fourteen days in Nashville, the road should pay to Briggs & Bro., $30. The arbitrators assessed no other damage, except for the detention at Nashville. The $30 having been paid, Briggs & Bro. then received the barrels, which at that time were empty.

Montgomery & Co. made out their account, and made oath to it in proper form, and brought suit

before a justice of the peace, who gave judgment for the defendants. Upon appeal to the Circuit Court, the cause was tried by a jury, who gave a verdict for the plaintiffs for $135, whereupon defendants brought the cause to this court, by writ of error. Upon the trial in the Circuit Court, several witnesses proved that, from the condition of the barrels when they reached Franklin, the wood of which they were made, must have been green when they were filled with the oil. Several other witnesses at Louisville proved that barrels of green wood would not hold coal oil, that it was always put in seasoned barrels, and that this lot of barrels was seasoned and in good order when shipped.

The defendants below, sought to make the plaintiffs responsible for damages, on account of the oil having been shipped to them in barrels made of green staves, and to have the damages set-off against the amount of the account. They did not deny the correctness of the account on oath.

The Circuit Judge charged the Jury, "that the receipt of the carrier showing that the goods were in good order and condition, was conclusive of that fact as between the seller and buyer." In answer to the request of defendants' counsel to charge the jury, that, "notwithstanding the carrier receipted for them in good order and condition, he would not be responsible for loss occasioned by defective packing," the court remarked to the jury, "that such was the law, but it had no application to this case, but would apply in a suit between the consignor and the carrier." The court also charged

the jury, that this account, coming as it did, properly sworn to, from another State, was conclusive on the defendants, unless they denied it on oath; and the defendants would not be permitted to make any defense against it, except under oath; and, therefore, they could not plead a set-off, or recoup in any way for damages, or make any other defense."

By the concluding portion of the charge, as quoted, the Judge withdrew from the jury all the evidence of the defendants as to the nature and extent of their damages, and in effect, decided the case against them.

It is insisted for plaintiffs in error, that there was error in this charge, especially in that portion of it which relates to the effect of the account coming from another State properly sworn to. Section 3780 of the Code provides, that such an account "is conclusive evidence against the party sought to be charged, unless he shall, on oath, deny the account." This section of the Code is substantially the same as the act of 1819, c. 25, s. 1, which has been before this court several times for construction, but never, as we are aware, in the shape in which it is now presented. In the case of *Cave & Shaffer* v. *Baskett*, 3 Hum., 340, Judge Green gives the origin of the statute, and says that "our migratory population was constantly presenting cases where debtors and creditors became dispersed in different counties and states," making it troublesome and expensive to sue on their accounts and take depositions; and "to obviate this mischief, and to afford the creditor an easy and cheap means of collecting his debts, where they were justly due, and *no real defense*

existed, this act of 1819 was passed." He next proceeds to state the legal effect of the oath made to such an account. He says: "By c. 27, s. 4, of the same year, it is provided, that a party pleading *non est factum* to (or more correctly, denying the execution of) any promissory note, bill of exchange, &c., should make affidavit of the truth of his plea. The act under consideration only intended to put a proven account upon the same footing."

The act of 1819 again came before this court, in the case of *W. & A. R. R. Co.* v. *Mead*, 4 Sneed, 108, when Judge Harris adopted the reason for the passage of the act, given by Judge Green in 3 Hum., 340, quoting and italicising the words "against which *no real defense existed;*" but he decided that it was not intended to embrace an account regularly sworn to, which claimed the value of two boxes delivered to the Railroad Company as common carriers. He added: "It certainly was not the purpose of the Legislature to so far abolish the rules of evidence as to permit the plaintiff, who might reside in a different county or State, in every case where he might suppose he had a cause of action, either in *tort* or *ex contractu*, to set out his cause of action in the form of an account, and then, *prima facie*, at least, to make out his case by his own affidavit." It is obvious that the court at that time regarded the law as intended to be applicable only to cases "*against which no real defense existed;*" and that the legal effect of the affidavit was to make for the plaintiff a *prima facie* case for recovery. This would be sufficient, or in the language of the Code, "conclusive,"

against the defendant, unless he should deny the account on oath.

But suppose the defendant does not deny the items of the account, or that he bought them, or that the price is correctly charged, what is the legal effect of the affidavit? The answer is, to give the account the force and effect of a promissory note, on which the plaintiff has a right to take judgment, if the defendant has no real defense. But if he has a real defense, then he has the same right to make it against a sworn account, that he has to make it against a promissory note, without denying on oath the account or the execution of the note. He can not controvert the items of the account; no more than he can controvert the execution of a note, except upon oath. But he may make his defense by any plea that does not deny the account, just as he may plead to a note without denying its execution.

The case before us illustrates the propriety of this construction of the section of the Code under consideration. The defendants do not deny that they ordered the five barrels of oil, nor that they were correctly charged as to price. The affidavit of the plaintiffs as to the correctness of the account as made out, is not denied, and therefore they can not deny the account on oath. But they say that the oil was put up in barrels made of green staves, the immediate consequence of which was, that the oil was lost, and that thereby they are damaged. They claim the right to plead these facts by way of defense, and the proof shows that it is a real defense. We hold that, in such case the affidavit of the plaintiff to the account is

conclusive only in the sense of being sufficient evidence to entitle the plaintiff to a recovery, unless the defendant can overcome it by evidence sustaining the plea as to damages, on which he relies.

The charge of the Circuit Judge was, therefore, erroneous, and the judgment is reversed, and the cause remanded for another trial.

H. C. Hulme *et al.*, *v.* Thomas Brown.

1. Recoupment, *Must arise out of the matter sued on.* A landlord having contributed to cause injury to his renters' land by trespasses of stock, promised that if the renter would not hurt his stock, he would pay for the injuries done by them. On a suit by the landlord for his rent, the lessee offered to recoup the damages by the landlord's stock. Held that the damages did not so arise out of the contract sued on as to be a proper subject of recoupment.[1]

Cases cited: *Porter* v. *Stacker*, 3 Hum., 56; *Whitaker* v. *Pullen*, *Ib.*, 466; *Overton* v. *Phelan*, 2 Head, 446.

2. A charge right as applied to the evidence in the cause, but erroneous in the abstract, is not a ground of reversal.[2]

FROM WILLIAMSON.

Circuit Court, November Term, 1868. W. H. S. Hill, J.

J. G. Wallace, for appellant, cited 3 Hum., 56, 446; 2 Head, 447.

[1]See *Catron* v. *Cross*, *ante* 583; and see *Briggs* v. *Montgomery*, *ante*, 673.

[2]See *Crenshaw* v. *Smith*, Jackson, 1872.

H. C. Hulme *et al. v.* Thomas Brown.

T. W. TURLEY, for appellee; R. M. EWING with him cited *N. & K. T. Co.* v. *Harris*, 8 Hum., 558; *Bolinger* v. *Gordon*, 11 Hum., 61; *Keith* v. *Smith*, 1 Swan, 92; *Eddington* v. *Pickle*, 1 Sneed, 122; distinguished this case from Coulter's case, *Nelson* v. *Allen*, 1 Yer., 381.

NICHOLSON, C. J., delivered the opinion of the Court.

The questions of law in this case, arise upon the following facts: Brown rented to Hulme, fifty-eight acres of land for the year 1866, for which he was to pay two barrels of corn per acre. During the working season, Brown's stock was in the habit of getting into the field, and damaging the corn; also, other stock; and among them a boar of Hulme's. Brown was in the habit of watering his stock in the corn field; and sometimes when so turned in to water, and sometimes by jumping, some eight or ten head of Brown's mules ran over and injured the crop. The damages done to the crop were variously estimated by the witnesses, but no specific amount is stated in the bill of exceptions.

While the crop was being gathered, Hulme told Brown if he did not keep his stock out he would hurt them. Brown replied, that if defendant would not hurt his stock, he would pay for all damage they did to the crop. The fencing was bad. The promise of Brown to pay damages had express reference to damages that might occur after that time. No witness stated the damage done by Brown's stock exclusively, or undertook to separate it from damage done by the stock of other persons.

Brown sued Hulme for the rent of the land, and Hulme offered, and asked permission to recoup said claim

to the extent of the damage as ascertained by the proof to have been done to the crop by Brown's stock. On this point, the court instructed the jury that he would not be permitted to recoup for unliquidated damages, or to reduce plaintiff's claim, for such damages. The jury returned a verdict for plaintiff for $108, and defendant appealed to this court.

It is assigned for error, that the Circuit Judge held, in his charge to the jury, that the defendant could not recoup for unliquidated damages. We must construe the charge of the court as made in reference to the facts of the case on trial. He meant to be understood by the jury as instructing them that the unliquidated damages claimed by defendant for injury to his crop by the stock of plaintiff, could not be recouped in this suit. And so understanding his charge, as we have no doubt the jury did, we think there was no error in it. The true test by which it is to be determined whether defendants can recoup for damages or not, depends upon the fact whether the damages sought to be made a set-off arise out of the plaintiff's demands, and are such as defendant would be entitled to recover in a cross action: Code, 2918.

In the case of *Overton* v. *Phelan*, 2 Head, 446, Judge Wright, after citing the cases of *Porter* v. *Stacker*, 3 Hum., 56, and *Whitaker* v. *Pullen*, 3 Hum., 466, says: "In these cases, it was held that the amount of damages to which the defendant is entitled, in abatement of the claim against him in such case, will be the damages which he would be entitled to recover in a cross-action by him against the plaintiff for non-performance of his portion of the agreement."

If we apply this test to the case before us, it will be apparent that the defendant claimed no abatement in the amount due for rent, on account of the failure of plaintiff to perform his portion of the agreement as to the renting; but his damages are claimed on account of injuries to his crop by the trespasses of plaintiff, or by his negligence in allowing his stock to injure his crop. Such damages might be recovered in an action brought for that purpose, but as they did not arise out of the plaintiff's demand for rent, or out of a failure of plaintiff to perform his portion of the contract of renting, they were not the proper subject for a set-off in the case before us; and therefore, there was no error in the charge of the Judge in rejecting them, even if the proof had shown such damages as could be ascertained and estimated by the jury.

The judgment of the court below will be affirmed.

THOMAS POPE *et als*, Justices of White County, *v.* FOYSTER PHIFER *et als.*, Commissioners, etc.

1. CONSTITUTIONAL LAW. *Act of* 1868, *c.* 65. The Act of March 12, 1868, c. 65, to create a Board of Commissioners for the county of Madison, extended by the 15th section to the county of White, conferring on such Commissioners, appointed by the Governor, the powers of the Justices of the Quarterly Courts, is unconstitutional and void.
2. SAME. *County Court.* The County Court is one of the institutions of this State, recognized in the Constitution, and the powers conferred by the Constitution upon the Justices of the Peace in their collective capacity, are intended to be exercised in the County Court.

Thomas Pope *et als.* *v.* Foyster Phifer *et als.*

3. SAME. *Taxation and representation.* The power to be conferred upon counties to tax, can not, by any special or local law, be taken from the Justices of the Peace as a County Court, and conferred on local tribunals of particular counties, composed even temporarily of commissioners appointed by the Governor. Taxation by the County Court preserves the principle of taxation by the representatives of the tax-payers, which the other system infringes.

Cases cited: *Marr* v. *Enloe*, 1 Yer., 452; *State* v. *Ross*, 7 Yer., 74; *Van zant* v. *Waddell*, 2 Yer., 260; *Wally* v. *Kennedy*, 2 Yer., 554.

FROM WHITE.

Chancery Court at Sparta. W. H. GOODPASTURE, Ch.

MAURY & COLMS for plaintiff.

FARRISS for defendant.

FREEMAN, J., delivered the opinion of the Court.

This bill is filed by complainants, the three first of whom composed the Quorum Court of White county at the time, and other citizens of said county, to restrain by injunction the defendants from organizing as a Board of Commissioners, or Commissioners' Court, for the County of White, and to have a law that was passed by the Legislature on the 12th of March, 1868, entitled "An act to create a Board of Commissioners for the county of Madison," the provisions of which were extended, by the 15th section of said act, to the county of White, declared unconstitutional, and then to perpetually enjoin the Commissioners appointed from acting as such Board under said act.

This act, it is insisted, is in violation of the Constitution of Tennessee, and a number of grounds are assigned in the bill upon which its validity is attacked. It has

been argued with great zeal and marked ability by counsel on both sides; and as it is a question on which there has been difference of opinion, and which has given rise to much feeling and angry discussion, we propose to examine it as fully as the facilities at hand for such investigation will permit, and will endeavor to place our conclusions on the basis of sound reason, principle and authority.

Without at present citing the various provisions of this act of the legislature of our State, we may assume that it proposes to supplant and abolish that ancient institution of the State, known as the Quarterly Court, and place in its stead a Board of three commissioners, appointed by the Governor, conferring upon the Commissioners the powers of the Quarterly Courts, together with some additional powers, perhaps not possessed by said court under the laws in existence at the time of the passage of this act by the legislature.

The first question presented for our consideration is, whether the legislature had the constitutional power to do this? And the next is, whether it could be done in the mode attempted; that is, by an exceptional enactment, applicable to one or more counties, and not by a general law, applicable alike to all the counties of the State, or operating equally and alike over the whole territory of Tennessee—in other words, is this the law of the land, within the meaning of the Constitution?

On the first question, there is some difficulty in arriving at a satisfactory conclusion. The County Court, or Quarterly Court, or Court of Pleas and Quarter Sessions, was part and parcel of the organized machinery of our State government at the adoption of the Constitution of

1834, and had been of the State of North Carolina before the adoption and formation of our original Constitution of government of 1796. By the Constitution of 1796, article 6, it is provided: "There shall be appointed in each county, by the County Court, one Sheriff, one Coroner, one Trustee, and a sufficient number of Constables, who shall hold their offices for two years. They shall also have power to appoint one Register and one Ranger for the county, who shall hold their offices during good behavior." By article 5, sec. 12, it is provided, that "Justices of the Peace shall be appointed for each county;" and their number was limited to two for each captain's company, except for the company that includes the county town, and in this they should not exceed three. Yet we find in this Constitution no provision establishing such a court. It is simply recognized and treated as one of the existing institutions of the State, well known, and therefore referred to simply as the "County Court."

This institution continued among us down to the time of the formation of the Constitution of 1834; and so far as we can learn from the history of that period, no complaint had ever been made of it—no wish had been expressed by any one to get clear of it, or to alter or abolish the system of arrangements of which it was a part, nor to substitute anything in its stead. We can not learn that the convention of 1834 had any purpose to abolish it, or had any proposition submitted to it, looking to such an end. We may safely affirm that, if such proposition had been presented, it would have been promptly rejected. That convention had in it much of the best talent of the State, and lawyers whose learning

and thorough acquaintance with the machinery of our State government, has not been excelled by any who have lived in the State.

In arriving at a correct conclusion as to what the Constitution intended to establish, and what to abolish, or its true intent and meaning on questions such as are involved in this case, in the language of Judge Denio, in delivering the opinion of a majority of the Court of Appeals in the case of *The People* v. *Draper*, 15 N. Y. Rep., 537, "we must keep in mind that the Constitution was not framed for a people entering into a political society for the first time, but for a community already organized and furnished with legal and political institutions adapted to all, or nearly all, the purposes of civil government, and that it was not intended to abolish these institutions, except so far as they were repugnant to the Constitution then framed."

We may assume the proposition to be a correct one, that the intent and meaning of the Constitution, when arrived at in accordance with established principles of construction, is the supreme law of the land to our legislature, and that the legislature has plenary legislative—that is, the law-making power—except in so far as they are restrained by the Constitution of the State, or of the United States. The prohibition to exercise a particular power, or make a particular enactment, need not be expressed however, but may be implied. And that such an implication would fairly arise when we can see from the Constitution that certain arrangements therein provided for, or certain institutions, or parts of the existent organization of the State, are referred to as being the

agencies charged with the performance of certain duties by the terms of that instrument, and that the existence of these agencies was contemplated as continuing, and was thus, however remotely recognized by the Constitution, that such reference would amount to a fairly implied constitutional establishment of, or at any rate, recognition of, and continuance of, such existing agencies or organizations.

Now, we look at the fact that, by the Constitution of 1796, article 6, referred to above, the County Court is chargeable with the election of certain officers, yet we find no other notice of its organization or establishment in that instrument. We find, however, that as then recognized, it continued in existence as part of the machinery of that well-known, settled, and established political and civil division of our state government, the county, up to the adoption of the Constitution of 1834, and conclude that if such an innovation as the destruction of the County Court had been contemplated, or if authority had been conferred on the Legislature to make such change, it would have been plainly conferred by express provision.

But without insisting on this view, as conclusive, we may safely and surely look at the Constitution itself, and see in the light of the facts existent at the time of its adoption, whether or not in that instrument there is by fair inference a recognition of the existence and intended perpetuation of the Quarterly or County Court. If so, the Legislature can not abolish it and supplant it by other agencies, differently constituted, though charged with the same duties and given the same powers.

It is provided by article 6, sec. 15, of the Constitution,

that the counties of the State shall be laid off into districts of convenient size, so that the whole number in each county shall not be more than twenty-five; and that there shall be two Justices of the Peace elected for each district, including county towns, which shall elect three, etc.

In article 7, sec. 1, it is provided among other things, "There shall be elected for each county, by the Justices of the Peace, one Coroner and one Ranger, who shall hold their offices for two years."

By sec. 2 of said article, "should any vacancy occur subsequent to an election in the office of Sheriff, Trustee or Register, it shall be filled by the Justices," etc.

It will be seen that the same officers are here to be elected by the "Justices of the Peace"—that is, the Coroner and Ranger; and, in case of vacancy, of Sheriff, Trustee and Register, that were by the Constitution of 1796, art. 6, directed to be appointed by the "County Court." It is true that the Sheriff and County Trustee, who were to be appointed by the County Court by said 6th article, are to be elected by the provision of the 7th article, sec. 1, of the Constitution of 1834, by the people, except in case of vacancy. Yet, we do not see how any one can take the two articles together, and the facts existent at the time of the adoption of the Constitution of 1834, and not conclude that the only change intended to be made by the Convention in article 6, sec. 1, of 1796, was, that the Sheriff and Trustee should be elected by the people, but the Rangers and Coroners were to continue to be elected by the Justices of the Peace—that is, by the County or Quarterly Court, assembled as has been their wont from the foundation of the State; that by "Justices of the

Peace," in article 7, sec. 1, of the Constitution of 1834, was meant precisely the same thing as "County Court," in article 6, of the Constitution of 1796.

This view of the case is strengthened by the fact that there is no provision for their special assemblage for the purpose of performing the duty with which they are here charged in the election of these officers; and it certainly was not contemplated that their election was to be by the Justices, each voting or choosing in his separate district, without concert with his co-Justices of the same county.

Contemporary construction, as given by the action of the Legislature, and of the people or Justices in the election of their officers after the adoption of the Constitution, strengthen and confirm this view of the case. We find in the compilation of our statutes, made under the direction of the Legislature in 1836, immediately after the Constitution went into effect, that the act of 1829, c. 37, is continued. That act provides, "it shall be the duty of the several County Courts in this State, at any time when a vacancy shall happen, to elect one Ranger," etc.; and at the head of the chapter—Constitution of 1834, art. 7, sec. 1—is referred to for the constitutional provision giving the authority for the election: See Car. & Nic., p. 560. As to Coroners, the act of 1785, c. 3, was continued in said compilation, "that each Coroner shall, before the Justices in court, enter into bond," etc., sec. 6; See Car. & Nich., p. 186, and under the title "County Court," will be found the act of 1817, c. 48, s. 8, providing that "all elections for Rangers and Coroners shall take place on the second days of the Term, as formerly, on which

day it shall be the duty of all the acting Justices of the Peace of the county to attend for that purpose."

In these various provisions are certainly contained a clear and unequivocal contemporary view of the provisions of the Constitution of 1834, recognizing; as one of the constitutionally continuing institutions, existent at the time of its adoption; the assemblage of the Justices of the Peace, in County Courts, charged with the election of the officers above referred to, and as a matter of course, with other duties appertaining to and annexed by law to their assembled organization, known as the County Court. In other words, the Legislature that assembled immediately after the adoption of the Constitution of 1834, construed that instrument as perpetuating what was known before as the County Court; and, as recognizing that certain duties were imposed on said body by the Constitution, which necessarily implied and demanded its continued existence. Mr. Cooly, in his admirable work on Constitutional Limitations, page 67, lays down the following sound principles applicable to this question: "Contemporaneous construction may consist simply in the understanding with which the people received it at the time, or in the acts done under it in operation, and which necessarily assume that it is to be construed in a particular way. In the first case, it can have very little force, because the evidence of the public understanding, when nothing has been done under the provision in question, must always be necessarily vague and indecisive. But when there has been a practical con-

struction, which has been acquiesced in for a considerable period, considerations of adhering to this construction present themselves to the courts, with a plausibility and force which is not easy to resist. Indeed, when a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had an opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

From this view of the case, we are led to the conclusion that the Constitution in the articles cited, looked to the continued existence of this assemblage of the Justices of the Peace of the county for the performance of the duties therein imposed, and that it was recognized as an assemblage representing the corporate existence of that constitutional division of our State known as a county; and that this institution, in this aspect of it, must continue until abrogated by the action of the people in changing the constitutional provisions referred to.

There are other provisions of the Constitution that we think might probably be referred to as bearing on the question; such as the provisions of art. 2, sec. 29, giving the Legislature power to authorize counties and incorporated towns in this State to impose taxes for county and corporation purposes, etc.—involving the idea of the action of a county as a corporate body, and, as such, being represented by a body of men answering to the corporators, or representing the body

upon which the duty is imposed, or to whom the privilege was granted. We have but little doubt that in these provisions it was understood that the county as a corporation, or quasi corporation, was to be represented by the Justices in County Court assembled. In addition to the recognition by the Legislature that adopted the revisal of our laws made by Messrs. Nicholson & Caruthers, as shown in reference to the election of the officers herein referred to, it will be seen that the various acts of previous Legislatures, fixing the duties of the County Court in reference to the local administration of the affairs of the county, are continued in force—such as the act of 1827, c. 49, s. 14, authorizing the County Court to appropriate money for the payment of jurors, the costs of criminal prosecutions, to solicitors, to Sheriffs and Clerks, for *ex officio* services, and making out tax lists, for repairing and taking care of court-houses and public buildings, jails and bridges.

By s. 15 of said act, "Where the County Court shall make an appropriation, not exceeding $50, one-third or twelve of the members shall be present, whose names shall be incorporated in the order;" and then it is provided, that in all appropriations hereafter to be made by any of said courts, the vote shall be taken on the same by *ayes and nays*, the Clerk calling and recording the name of each Justice, together with his vote, and entering his vote as given on the minutes, etc. It will be seen here that the body is understood to have been continued in existence after the Constitution of 1834, and that from these provisions,

in all matters involving taxation of the county, it is treated as the quasi legislature of the county; and the principle of responsibility for their action to the people of the county, whose money they should appropriate, is carried out by the same means that fixes such responsibility on the members of our Legislature—that is, a vote by ayes and nays, recorded on the minutes of the court, so that the people, the constituency, of these Justices in county court assembled, could see from the record of their proceedings, who had voted for, and who against, each appropriation of their moneys, and hold them responsible if the appropriation was not a proper one.

It is true that the act of 1835, c. 6, was passed establishing a court in each county, to be held by the Justices of the Peace, on the first Monday in every month, one-third or twelve of the Justices of the county to be a quorum—three of the said Justices having power to take probate of wills, grant letters of administration, etc. We think this act was probably passed to organize this particular court, as a court under s. 3 of art. 6 of the Constitution of 1834—providing that "courts may be established to be holden by Justices of the Peace," yet this in no wise interferes with, or contravenes the idea that the quarterly assembly of the Justices, known as the County Court, with peculiar powers and duties, with reference to the local interests of the county, is not to be superseded, and was not so intended or understood to have been intended at that time, by the provisions of the Constitution of 1834.

These various provisions are substantially transferred

to the Code of Tennessee enacted by the Legislature in 1858.

We conclude from this review; inasmuch as Justices of the Peace are constitutional officers, and their functions as such well known at the time of the adoption of the Constitution of 1834, and as by art. 7, ss. 1, 2, taken in connection with the established order of things at the time, and contemporaneous construction by the Legislature of 1835 and 1836, together with the uniform understanding of all departments of the government from 1834 to the passage of the acts, or class of acts in question, the assemblage of the Quarterly or County Court of each county, as the quasi representatives of the counties, as corporate or quasi corporate communities, is, as we think, most clearly recognized and necessary for the performance of the duties imposed in the Constitution; that no Legislature of Tennessee, or any body short of a constitutional Convention, can change or alter or abolish this established order of things. This having been attempted in this case, and the law having no other purpose, if this purpose fails, the whole law must be treated as a nullity and declared void.

We do not mean in this opinion, to adjudge or decide anything upon the question of the organization of special courts, or of tribunals of any kind in counties, such as special criminal courts, but to confine this opinion to the simple question of the power of the Legislature to overturn the local government, so to speak, of a county, displace the assemblage of the recognized organization representing the county, to whom duties are assigned by

the Constitution, and place in its stead other organizations, unknown to our past history up to the passage of the law of which the act of 1868 is a part, and never contemplated by the Constitution, nor purposed or provided for in that instrument.

The next view of this question, is, whether this law, and the others of its class, is the "law of the land," under sec. 8, art. 1, of the declaration of rights under the Constitution, or a general law under art. 11, sec. 7, of the Constitution.

The first article referred to is, "That no freeman shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

Art. 11, sec. 7, is, "The Legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law; *provided, always*, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

We turn to the leading provisions of the law in question, and see what is proposed to be done by it, in order to ascertain whether it comes within and is

obnoxious to these great fundamental provisions of our Constitution. If so, it deserves, and must receive, our prompt and unqualified disapprobation, and be declared by us, in discharge of our constitutional function, absolutely void.

By the 1st section it is provided, in substance, that "there shall be established for the county of Madison, (and by the 15th section the general provisions of the law are extended to White, and by different sections to other counties,) a Board of Commissioners, to serve three years, who shall have resided in the county one year, each to serve for three years, and until their successors are elected and qualified, except in cases of appointment as hereinafter provided. That one of the Commissioners is to be elected by the qualified voters of the county on the first Saturday of March of each year; the first election to take place in 1869, and annually thereafter. Until such election takes place, the said Commissioners shall be appointed by the Governor of the State, who shall designate in the Commission to be issued to each of said Board, the period at which their terms shall successively expire, etc.; the last named, that is the one whose commission is to expire in 1871, to be the President of said Board, till the term of his office as Commissioner expires; after which each member of said Board shall be President thereof from the commencement until the close of the last year of the term of his service. By section 2, in case of vacancy by death, resignation or removal of any one of said Commissioners, his place shall be filled by appointment by the Board, until the next annual

election by the people. By section 3 it is provided that the Commissioners shall give bond and sureties in the sum of $2,000, and take an oath of office, such as is required to be taken by other county officers. By section 4, this Board is to hold four sessions annually at the county seat, at the times now prescribed by law for the holding of the regular Quarterly Courts of these counties. The Clerk of the County Court shall be Recorder of said Board and perform the duties now required to be performed by him as Clerk of said Quarterly Court. By section, 5 "all powers and duties which are now vested in, and performed by the Quarterly Court of said county, shall be vested in said Board of Commissioners; and in addition to the powers now conferred by law, the said Board shall have authority to insure the public buildings and other property of the county; to order and contract for surveys and maps of the county; to provide for payment of expenses and furnishing court rooms; to establish grades; to purchase record books, all necessary stationery for their own use as a board, and for clerk's offices and other courts in the county; to provide for the compensation and expense of jurors as fixed by law; to appoint an attorney for the county, whose duty it shall be to prosecute and defend all suits in behalf of the county, to advise the commissioners on legal questions, to inspect and examine all bonds of other officers of the county, to prepare blanks to be used by said commissioners, and other necessary matters within the sphere of his duties, which may be required of him by said board; to appropriate money for their own salaries and

the salaries of other county officers; to subscribe stock in railroads, which the county of Madison had been authorized by general or special law to subscribe, and to represent such stock in all elections for directors, and to provide for payment of subscriptions as made. No money shall be drawn from the treasury, except upon a warrant by the President of said Board, countersigned by the Clerk of the County Court; and the said Commissioners are hereby vested thus with all the powers heretofore vested in the County Courts by sections 4206, 4207 and 4211 to 4215.

By section 6, the magistrates of said county shall be, and are hereby, relieved from all further duties and obligations incidental to their office as members of the Quarterly Court of said county.

The compensation for the President of the Board is fixed at $500, and the others at $400, payable out of the County Treasury.

The first thing that strikes us on looking at this strange enactment of the Legislature, is its startling novelty, as compared with anything that ever existed under our Constitution from the organization of the State to the date of the act. In the second place, we remark that all the presumptions arising from a past history of about seventy years, without ever having been once suggested by any legislative body, rise up against the idea that such an organization or body, was ever contemplated by our fathers, who made the Constitution under which this act was passed.

That taxation and representation necessarily go together, was and should be an axiom in our govern-

ment; and if there is any matter upon which we can say that our people were sensitive at the adoption of our Constitution, above all others, it was the question how, and by what power, the taxes they were to pay should be imposed; and that a strict responsibility should attach to those who did impose them. Our own Supreme Court has held that taxation and representation must go together, and the opposite is tyranny —and therefore held that to tax a Cherokee, resident within the limits of the State, without at the same time extending to him the rights of citizenship, would be to practice the same despotic power against which our ancestors rebelled: *State* v. *Ross*, 7 Yer., 74. In the case of *Marr* v. *Enloe*, 1 Yer., 452, this principle is asserted in reference to the right of taxation delegated by the act of 1827, c. 49, s. 1, to the County Courts to fix at discretion the amount of tax to be levied.

It is well said by the Court of Appeals of New York, in the case of the *People* v. *The Mayor, etc., of Brooklyn*, 4 N. Y. Reports, 426, that this "vital power, that of taxation, may be abused, but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." Chief Justice Marshall, in the case of *McCullock* v. *Maryland*, 4 Wheaton, 428, said "The only security against the abuse of this power is found in the structure of our Government itself. In imposing a tax the Government acts upon its constituents," and we add in his own language

that the theory of our Government assumes, "that the influence of the constituents over their representatives to guard them against the abuse," is a principle that can never be departed from without vitally affecting the rights of liberty and property of the people. Whoever has the power to impose a tax upon another, has to that extent the right to take the proceeds of his labor for the public use, or in payment of that tax. One of the most prominent features of a state of slavery, is, that the labor of one man, and its proceeds, may be taken and applied to the use of another, without his consent. So that we can see that the power of taxation, whenever exercised without consent, and without clearly defined limitations, has in it, in fact, one of the harshest features of tyranny, as well as one of the most essential elements of a state of slavery.

It will be seen that all the powers of taxation for county purposes, formerly exercised by the Quarterly Courts, who were elected by the people and responsible to them—who occupied the position of representative in fact, practically, though perhaps not in theory, is by these enactments transferred to these Commissioners, and they appointed by the Governor of the State—it is true, after a while to be elected by the people—but the defendants to this bill hold the tenure of their offices by virtue alone of the will of the Governor of the State.

Can it be believed for a moment, that the power was ever intended to be delegated by the people to the Legislature to authorize such a body, so appointed

and constituted, to perform the functions assigned to them in this act? We think no reasonable man can come to such a conclusion.

Another view of this question: Here is a power to take from the people their property by taxation, by which they may be destroyed, or burdened with burdens too grievous to be borne; and that by a special enactment, applicable only to a few counties, which are either made the special recipients of this favor by the Legislature, or the special objects for imposition of these burdens, as it may happen to be viewed. This is not, then, upon sound principle, in any sense, a law of the land; and yet it—by and through the agencies put in operation by it—deprives the people of their property at the will of men appointed by the Governor of the State. We think this view of the question conclusive as to the unconstitutionality of this law; and upon this last ground, would be bound to hold it not a "law of the land," and therefore of no validity. The clause, "law of the land," in our Constitution, imports a general public law, equally binding upon every member of the community: *Vanzant* v. *Waddell*, 2 Yer., 260; *Wally's Heirs* v. *Kennedy*, 2 Yer., 554.

We add in conclusion, that the very idea of law is exclusive of, and forbids such exceptional legislation —that is, "a rule of action prescribed by the supreme power in the State." This involves the idea, not of local regulation, upon matters of general interest at least, but of a general rule, alike applicable to all the State. We are aware that there may be excep-

tions to this rule, but this is not one of them. We can see clearly that the evils intended to be guarded against by requiring laws to be general and operative upon all the people or parts of the State alike, are to be found in this case as well as any other. One reason that underlies and is the basis of objection to all exceptional legislation in a country like ours, is, that the principle of responsibility of the representative of the people, to that people, for the correctness of his conduct, as a legislator, is a fundamental one, and furnishes in most cases, the only check upon his conduct. If all laws are required, as the general rule, to be operative upon all the people of the State, each representative is compelled to take the responsibility by any legislation in which he may concur, of fixing its burdens, if any be imposed, upon his own constituency, as well as that of the other parts of the State. He thereby is compelled to assume the responsibility for the propriety of the law passed by the body of which he is a member. If the contrary character of legislation may be allowed, then he may and will be willing to fix burdens on others, to whom he is not responsible, and we have no responsibility imposed upon him, as the result of his action, to the people whose representative he is, in the legislative assembly of the State.

We can see how members of the Legislature may be willing to oblige partisans or designing men, by organizing Boards of Commissioners for other counties, who would not dare to vote for such a measure if it was general and operative alike upon their own constituency

or the people or the whole State, instead of spending its force upon the interests of one or more obnoxious counties, or upon a community with whom the larger portion of the members of the Legislature had no connection, and to whom they feel no sense of responsibility, and to whom they are not personally accountable for their conduct.

We hold, then, that a law of this character, which proposes to break up the established order of things in the ancient organized machinery of the State, should, if allowable at all, be a general law, operative alike upon all parts of the State, in order that the people may be guarded from hasty and ruinous legislation, by a sense of wholesome responsibility, imposed upon the representative, to that people upon whom the laws enacted must be operative. This is essential to guard the weak from oppression on the part of the strong, and give all an equal measure of justice, of benefit and advantage from the laws, and to secure an equality necessary to the public good in the burdens and impositions that may be fixed upon the people by the legislature.

We will not countenance any departure from this great and vital principle, unless it be clearly authorized by the Constitution of our country; and we do not think the laws now under discussion present any considerations that will authorize a liberal construction of the Constitution in their favor. Feeling assured that all exceptional legislation of this character is evil in its tendency, we can safely declare it in violation of the constitution, and strike it down with the certainty that no

great public or private interest will, in the least, be injuriously affected by such decision.

The question has now ceased to be a practical one, as all the legislation of this character, complained of in this bill, has been swept away by a Legislature that has been guided by a feeling of deeper reverence for the past, and a more thorough recognition of the long established usages and customs of the people whom they represented.

It has been earnestly pressed on us that as a co-ordinate department of the government, we should approach with great tenderness a conclusion that the Legislature had violated the Constitution by any of its enactments. On this question we may make one remark, that whatever is constitutionally enacted by the Legislature, is binding upon us as a court, and we shall firmly and fairly enforce it as the law of the land. Yet we shall with equal firmness, and without any feeling of hesitancy on our part, declare any enactment a nullity, and binding on no one, that violates either the Constitution of the United States or of our own State. This high duty is imposed on us by the position which we occupy, and we shall not at any time, shrink from its performance, or hesitate for a moment in announcing our decisions upon such questions. We know that in these constitutions are embodied the guaranties for life, liberty and property, won from power in all ages past by brave and true men—patriots and lovers of freedom—and if sternly and truly enforced by an enlightened and fearless judiciary, the liberties of our people are safe from all things but the strong hand of military power, or despotism, backed and sustained by such power. Against power thus sup-

ported, the judiciary is powerless; but when such power shall grow formidable enough in a republic to be put in motion against the liberties of the people, the days of constitutional freedom will already have been numbered, and an independent judiciary be unknown—a constitution, with its limitations upon power, be but a name, a shadow, the substance and reality having passed away.

The decree of the Chancellor is reversed; the injunction granted made perpetual, and the defendants will pay the costs of the court below and of this court.

At this term, on the 1st day of March, on an indictment, under the Code, 4819, against James Peacock, for taking upon himself to exercise and officiate in the office of President of the Board of Commissioners of the county of Sumner, it was said that, in this case it had been held "that the statute creating the office of Commissioners is unconstitutional and void, and consequently the offense charged does not come within the provisions of the Code." Per NELSON, J.

It has also been held, in the case of *Shelby County* v. *Butterworth*, Jackson, June 27, 1871, that county warrants issued by the President of the Board of Commissioners for Shelby county, were void, whether in the hands of the first taker or of an indorsee.

W. P. Smith, Adm'r, *v.* M. C. Puryear, Ex'r.

W. P. SMITH, Adm'r, *v.* M. C. PURYEAR, Ex'r.

WILL. *Codicil. Republication.* A testator made a will devising his home place. He afterwards bought eight acres adjoining, on which he erected a horse mill. Some time after he executed a codicil, which makes no allusion to the devise of the home place. The eight acres would be undisposed of unless held to pass by that devise. Held to pass.

Cases cited: *Gass* v. *Gass*, 3 Hum., 286; *Stover* v. *Kendall*, 1 Cold., 560.

Code cited: 2195.

FROM WILLIAMSON.

Chancery Court at Franklin. June Term, 1868. W. H. S. HILL, J., presiding.

EWING, HOUSE & TURLEY, for complainants.

MCEWEN & BULLOCK, for respondents.

NICHOLSON, C. J., delivered the opinion of the Court.

In 1845, Samuel Winstead made his will, by the fourth item of which he gave to his wife, Susannah, his tract of land on which he then lived. In 1848, he bought eight acres of land lying parallel with and adjoining to his home tract. It was situated at a short distance from his residence, and separated from it by the Columbia turnpike. On this eight acres he erected a mill. His family grave-yard was on the same side of the turnpike with the eight acres, and very close to it. In 1851, he executed a codicil to his will, and soon afterwards died.

W. P. Smith, Adm'r, *v.* M. C. Puryear, Ex'r.

M. C. Puryear, as executor of Samuel Winstead's will, in pursuance of its directions, sold the real estate of his testator, and with it the eight acres, not regarding it as belonging to the home tract. W. P. Smith, as administrator with the will annexed, of the widow of Samuel Winstead, claims that the eight acres belonged to, and was a part of the home tract, and therefore that it was the property of his testator, under the will of her husband, Samuel Winstead. The bill is filed for the proceeds of the sale of the land.

There is no proof except as to the relative location of the eight acres to the lands and house of Samuel Winstead. His lands are on both sides of the Columbia turnpike. The eight acres lie on the northern side of the Winstead home place, and within sixty or eighty yards of the house. Winstead put upon the eight acres a horse grist mill. When the original will was made, in 1845, Winstead was not the owner of the eight acres; hence, when he used the language in his will, "my tract of land on which I now live," he could not intend to include this eight acres. When he made his codicil, in 1857, he had bought and was the owner of the eight acres; but he makes no allusion to it in the codicil, and leaves his original will unchanged as to the devise of the home place to his wife.

The making of the codicil was a republication of the will made in 1845: *Gass* v. *Gass*, 3 Hum., 286; *Stover* v. *Kendall*, 1 Cold., 560. We are to presume that when testator executed the codicil he was satisfied to re-adopt the original will in all its provisions, ex-

cept as changed by the codicil. It follows that, in 1851, he intended to give to his wife the tract of land on which he then lived. The eight acres were at that time, a part of the tract on which he lived. We are to presume that he so regarded it, as he made no provision in the codicil in respect to this eight acres; and unless he intended it to pass to his wife, as part of the home tract, he died intestate as to that.

The law presumes that a testator intends to dispose of all his estate, and to die intestate as to none: Code, 2195.

We are, therefore, of opinion that complainant is entitled to the proceeds of the sale of the eight acres of land, as the property of his testatrix.

The decree below is reversed, and the defendant will pay the costs of this court, and of the Chancery Court.

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See CRIMINAL LAW. *State* v. *Bowlus*, 29.

ATTORNEY AND SOLICITOR.

1. *Minors, complainants in bill to sell land; Purchasers at sale, not subject to release.* A solicitor who filed a bill for sale of land, joining minors as complainants, before the decision of *Davidson* v. *Bowden*, 5 Sneed, 129, did not forfeit his right to compensation, or incur any liability, if purchasers at the sale were released by the court. It was error for the court to release the purchasers on their motion. *Fulton* v. *Davidson*, 614.

2. May have compensation as solicitor and executor. *Ib.*, 614.

3. Attorney assigned. See COUNSEL FEES. *Wright* v. *State*, 256.

BASTARDY.

Indemnity of county. A bastardy proceeding, which does not show that the bastard is likely to become a county charge, is defective, and will be quashed. The object of the law is to indemnify the county. *State ex. rel.* v. *Jameson*, 108.

BILL OF EXCEPTIONS.

In criminal case must show that venue was proved. *Mayes* v. *State*, 430. *Alexander* v. *State*, 475.

BILL OF REVIEW.

See CHANCERY PLEADING, 2, 3, 4. CH. PRACTICE, 7, 8, 9.

BOOK DEBT.

Two years' limitation. Adm'r. The limitation of two years, within which a book debt is to be sued on, applies as well to a suit by an administrator as by the original party to the account. *Perkins* v. *Moss*, 671.

CEMETERY.

See JURISDICTION. *Wills* v. *State*, 141.

CERTIORARI.

Court must act upon grounds laid. A *certiorari* granted to re-try a cause, does not authorize a court to quash the execution issued on an erroneous judgment, without trial. *Glover* v. *Holman*, 519.

CHANCERY JURISDICTION.

1. *Compromise of infants' rights.* Where a compromise is made of doubtful rights the Chancery Court has power, on behalf of minors, to ratify the compromise, and will exercise the power where it is plainly for the benefit of the minors. *Reynolds* v. *Brandon*, 593.

See SET-OFF. SURETY. TRUSTEE.

CHANCERY PLEADING.

1. *Bill and amended bill.* Where original and amended bills are filed, they are both to be looked to, to support the complainant's case, on demurrer to the amended bill. *Bradley* v. *Dibbrel*, 522.

2. *Bill of review. Answer. May contest what.* An answer to a bill of review can not go behind the decree attacked, to again put in issue matters which were in issue before the decree. *Saunders* v. *Gregory*, 567.

3. *Same. Error of Law.* A bill of review, because interest was charged on a fund in the hands of a party, when, by a previous decree, was in effect precluded from loaning, held good without leave, it being error of law. *Ib.*

CHANCERY PLEADING—*Continued.*

4. *Same. New Matter. Waiver.* A bill of review, alleging that the fund in complainant's hand had been received in Tennessee money, and other funds, which had become depreciated since received, not being demurred to for want of leave to file it; held good, and that want of leave was waived. *Saunders* v. *Gregory*, 567.

5. *Innocent purchaser. Plea of.* A statement in an answer, by the purchaser of land, under a mortgage given to a surety, that when he purchased he paid a part of the purchase money to the mortgagee and it was his understanding that the mortgage debts were to be paid; that he thought he had a good title, and that a purchaser, from him understood it in that way, is not good as a plea of innocent purchaser. *Saylors* v. *Saylors*, 525.

6. *Same. Same.* A plea in an answer, averring the payment of the purchase money, partly in cash notes, but which did not aver that the vendor was seized or pretended to be seized in fee, or state who were the makers of the cash notes, or that the beneficiaries in the outstanding mortgage had knowledge of his purchase, and in other respects failed to meet the requirements of the numerous decisions of this court, can not be maintained as a plea of innocent purchaser. *Ib.*

CHANCERY PRACTICE.

1. *Order to pay out fund. Interest.* A party directed to let a particular person have a fund, can not loan such fund without a violation of the order and of his duty, and can not be charged with interest for keeping the fund. *Saunders* v. *Gregory*, 567.

2. Loan contrary to order. See TRUSTEE. *Fulton* v. *Davidson*, 614.

3. *Party made on petition.* A person having an interest may become a party to proceeding for his benefit, by petition in the cause. *Saylors* v. *Saylors*, 525.

4. *Verification of answer.* An exception to an answer coming from another State, because it is certified by a justice of the peace, without the certificate of the clerk of his court, to his official capacity, required by Code 4398, is good, and should be sustained. *Bradley* v. *Dibbrel*, 522.

5. *Decree of Supreme Court. Remand for amendment.* Where a cause was brought to the Supreme Court by purchasers under a decree, to have it reversed because infants were made complainants, instead of being made defendants, and the court remanded the cause for amendment and further proceedings, whereupon the court below released the purchasers and made a new sale; this was held erroneous. The position of the infants should have been changed, and the sales confirmed. *Fulton* v. *Davidson*, 614.

6. *Decree. When Final.* A party holding a fund for distribution among

numerous parties, filed a bill to ascertain the parties entitled to the fund, and to have the direction of the court as to the distribution. The moneys were in part loaned *pendente lite* by order of the court. At the February Term, 1861, direction was given to get in the fund by the next term, and to let the heirs of Smith Gregory have what they may choose to receive, on bond to refund, if required. From this time until August, 1865, it does not appear that any term of the court was held. In August, 1865, a decree was had, upon a report of the Clerk and Master to the February Term, 1861, for amount in hands of complainant, $1,023.45, and interest to date, $276.77, which he was directed to pay into the Master's office within three months, or execution to issue. The decree further directed a report as to the remainder of the fund collected and uncollected. *Held*, to be a final decree on which a bill of review would lie as to the fund and interest decreed to be paid: *Saunders* v. *Gregory*, 567.

7. *Same. Same.* The bill of review being dismissed on demurrer, and a decree like that of August, 1865, being entered, the court below refused to allow an appeal. *Held*, that a writ of error would lie: *Ib.*

8. *Same. Power of Court over.* A Chancellor has no power after a decree, at a subsequent term to reverse it; and if he does so, it is error of law, for which a bill of review will lie. *Ib.*

9. *Same. Inconsistent.* The decree of August, 1865, directing the payment of interest on a fund which the decree of 1861 made it necessary for the party to retain, held inconsistent with the former decree, and so, erroneous. *Ib.*

CHANCERY SALE.

1. *Bill to sell to pay debts and for partition.* A bill to sell land and slaves to pay debts, and for distribution, may be maintained upon the ground of necessity to sell for partition and distribution, though the case made for necessity to pay debts wholly fail. *Fulton* v. *Davidson*, 614.

2. *Allowance to Commissioner. Considerations which affect.* A commissioner having made one sale, when the compensation allowed by law was inadequate—on a re-sale the court allowed, the law having been changed, a more liberal compensation on account of the insufficiency of the other allowance. *Ib.*

3. *Same. Change of law pending service.* The rate of compensation being changed after a sale, but before collection of notes, etc., the court below allowed the higher rate, and the Supreme Court refused to disturb it. *Ib.*

4. *Purchaser. Loss on re-sale.* A party buying lands at a Chancery sale,

CHANCERY SALE—*Continued.*

and failing to pay according to the terms of sale, is liable on a re sale to the payment of any deficiency in price. *Ib.*

See CHANCERY PRACTICE. 5.

CHARGE OF COURT.

See ERROR.

CHATTANOOGA.

Criminal Court of. See COURTS.

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COMPROMISE.

Consideration. A sale of real estate by a married woman, subsisting at her death, with a bill filed afterwards to enforce it, is a valid basis of a compromise on the part of her infant heirs with adult distributees. *Reynolds* v. *Brandon*, 593.

CONDITION.

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CONFEDERATE TREASURY NOTES.

Sale for. Creditors. The fact that land was sold for Confederate Treasury Notes, does not affect the validity of the sale as to creditors of the vendor. *McDonald* v. *Kirby*, 607.
See TRUSTEE, *Saunders* v. *Gregory*, 567.

CONFESSION.

See EVIDENCE.

CONSTITUTIONAL LAW.

1. *Right of accused to be heard.* Under the Constitution of the State, Art. 1, s. 9, giving to a person accused the right to be heard by himself and his counsel, the right conferred, is not to make a sworn or unsworn statement of facts not otherwise proved, but to argue the case upon the facts in evidence. *Wilson* v. *State*, 232.

2. *Act of* 1868, c. 65. The Act of March 12, 1868, c. 65, to create a Board of Commissioners for the county of Madison, extended by the 15th section to the county of White, conferring on such Commissioners, appointed by the Governor, the powers of the Justices of the Quarterly Courts, is unconstitutional and void. *Pope* v. *Phifer*, 682.

3. *County Court.* The County Court is one of the institutions of this State, recognized in the Constitution, and the powers conferred by the Constitution upon the Justices of the Peace in their collective capacity, are intended to be exercised in the County Court. *Ib.*

4. *Taxation and representation.* The power to be conferred upon counties to tax, can not, by any special or local law, be taken from Justices of the Peace as a County Court, and conferred on local tribunals of particular counties, composed even temporarily of com-

missioners appointed by the Governor. Taxation by the County Court preserves the principle of taxation by the representatives of the tax-payers which the other system infringes. *Ib.*

5. *Judicial Construction. Privilege.* The judicial construction of the word "privilege," established before the Constitution of 1870, is adopted by that Constitution. *State* v. *Schlier*, 281.

6. *Privilege Tax. Valid, though unequal.* The Act of 1870, c. 71, s. 1, taxing photographers as exercising a privilege, is constitutiona. The fact that the privilege is discriminated according to the size of the town where the establishment is situate, does not affect the constitutionality of the law. *Ib.*

7. *Privilege. Defined.* The exercise of an occuption or business which requires a license from some proper authority, designated by a general law, and not open to all or any one without such license, is a privilege within the meaning of the Constitution. *Ib.*

8. Omission of *contra pacem* in indictments fatal because required by the Constitution. *Rice* v. *State*, 215.

9. *Venue.* The Code, 5242, sub-sec. 9, which prohibits the reversal of a judgment "because the Bill of Exceptions omits to state that the venue was proven in the court below," is contrary to the Constitution: Art. 1, s. 9. *Mayes* v. *State*, 430; *Alexander* v. *State*, 475.

10. *Jury.* The Act of 1866, c. 5, s. 1, declaring that persons not qualified voters were subject to challenge as jurors, was unconstitutional and void. *Gibbs* v. *State*, 72.

11. *Appointment of Judges by the Bar.* The Act of 1870, c. 78, s. 1, authorizing the selection of a Judge by the members of the Bar, in certain cases, is not unconstitutional, but valid. *Ligan* v. *State*, 159.

12. *Cruel and unusual punishments.* Fine and imprisonment in the county jail, or in the Penitentiary, are not cruel and unusual punishments, within the meaning of the Constitutlon, Art. 1, s. 16. *Ib.*

13. Special courts are constitutional. *Wilcox* v. *State*, 110.

14. *Constitution of United States. Amendments not restrictions on States.* The Constitution of the United States, Art. 2, of Amendments, declaring the right of the citizen to bear arms, is a restriction alone upon the United States, and has no application to the state governments. *Andrews* v. *State*, 165.

15. *Intermarriage, or cohabitation of negroes and whites.* The Act of 1870, c. 39, making it a felony for white persons and negroes to marry or cohabit together as man and wife, is a valid act, not affected by the Constitution of the United States, the Civil Rights bill, or Enforcement law. *Lonas* v. *State*, 287.

See CRIMINAL LAW, ARMS. *Andrews* v. *State*, 165. *Page* v. *State*, 198.

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CONSTRUCTION.

1. *Of illegible writing.* See CRIMINAL LAW, INDICTMENT. *Williams* v. *State*, 376.

2. *Intent to prevail.* The construction of an instrument is to be arrived at, not only from its terms, but from the circumstances under which it is made, the motives which induced it, and the purposes and objects of it. *Hyde* v. *Darden*, 515.

3. *Condition. Precedent and subsequent.* Whether a condition be precedent or subsequent, depends upon intention, not form. *Hyde* v. *Darden*, 515.

4. *Of Statutes.* Where a literal construction of a section will render it repugnant to the provisions of another section, it shall be so construed, if possible, as to preserve both in operation. *Wilcox* v. *State*, 110.

5. Law of Costs to be liberally construed. *Williams* v. *State*, 313.

CONVERSION.

Contract of Sale. An executory contract for the sale of land, operates a conversion of the property into personalty, and the price of it goes to the distributees. *Reynolds* v. *Brandon*, 593.

See COMPROMISE, *Ib.*

CONVICTION.

See FORMER CONVICTION.

COSTS.

1. *Changed on affirmance.* Decree reversed as to costs, though not changed in any other particular. *McDonald* v. *Kirby*, 607.

2. *Fees for taxing costs.* The Clerk of the Supreme Court is entitled to tax a fee of fifty cents in each case, for taxing and entering on the execution docket the bill of costs from the inferior, and an addition-

COSTS—*Continued.*

al fee for taxing and entering the bill of costs in the Supreme Court. *Williams* v. *State*, 313.

3. *Law of, construed liberally.* The law of costs, is, by the Code, 3219, to be construed remedially; and this construction applies as well in favor of officers and witnesses, as of parties. *Ib.*

4. *Motion. Delinquent Tax Collector.* A delinquent revenue officer who pays over moneys after notice of a motion against him, is liable to the costs of the motion, though made after the date of the payment. *State* v. *Dail*, 272.

5. *Want of jurisdiction. Change of venue.* Where a change of venue, prohibited by the Constitution, is ordered, and the court to which the change is made, in consequence, has no jurisdiction, it can render no judgment for the costs of a trial which has taken place there; nor can the court of the county from which the cause came. *The State* v. *Logston*, 276.

COUNSEL.

Fees. Counsel assigned. Counsel assigned to defend a prisoner who is unable to employ counsel, are entitled to no compensation from the State or county. *Wright* v. *State*, 256.

See ATTORNEY.

COUNTY COMMISSIONERS.

See CONSTITUTIONAL LAW. *Pope* v. *Phifer*, 682.

COUNTY, NEW.

See JURISDICTION. *State* v. *Donaldson*, 48.

COURT.

1. *Terms of. Time of opening.* A Term of the Circuit Court opened on Tuesday; Monday being the day fixed by law for its commencement; is a legal term, and an indictment and conviction for felony at such term, is valid. *Henslie* v. *State*, 202.

2. *Same. If irregular, how waived.* If the term was not regular, the objection is waived by plea of not guilty and trial. *Ib.*

COURT, COUNTY.

1. A constitutional court. See CONSTITUTIONAL LAW. *Pope* v. *Phifer* 682.

2. *Jurisdiction.* A petition lies in the County Court against an administrator and his sureties, under Code 2312, 2313, to compel payment of a distributive share. *Stewart* v. *Glenn*, 581.

3. *Petition in. Parties.* A proceeding in the County Court to recover a distributive share must make all the distributees parties. *Stewart* v. *Glenn*, 581.

COURTS, SPECIAL.

1. *Criminal Court of Montgomery.* The Act of 1870, c. 115, "To establish a Criminal Court for the county of Montgomery," is constitutional. *Wilcox* v. *State*, 110.

2. *Same. Judge may certify transcript to.* An act establishing the Criminal Court of Montgomery county, requires the *Circuit Court* to certify to the Criminal Court, transcripts, &c., and the Criminal Court to enter the transcripts on the minutes; and enacts that the entry of record shall give to said court jurisdiction, &c. Held, that a transcript certified by the Circuit Judge, entered of record, &c., gave the court jurisdiction. *Dove* v. *State*, 348.

3. *Objection. What waived by plea.* If any exception could have been taken, it was waived by plea of *not guilty*. *Ib.*

4. *County Court of Hamilton. Criminal jurisdiction.* The Act of 1870–71, c 82, s. 1, giving criminal jurisdiction to the County Court of Hamilton county, of all offenses under the grade of grand larceny, confers such jurisdiction in all cases where the limit of punishment is lower than in grand larceny. The grade is to be determined from the amount of punishment affixed. *Robeson* v. *State*, 266.

5. *Law Court of Chattanooga. Grand Jurors in Circuit Court.* The Act establishing the Special Court at Chattanooga, does not disqualify citizens of the districts over which it has jurisdiction, from serving as jurors, grand or petit, in the Circuit Court. *Williams* v. *State*, 37.

COURT, SUPREME.

See SUPREME COURT.

CREDITS.

See APPROPRIATION. *Fulton* v. *Davidson*, 614.

CRIMINAL LAW.

AFFRAY.

Need not originate in a public place. A fight commenced in private, but carried by flight and pursuit, to places where people are assembled, is an affray. *Wilson* v. *State*, 278.

ARMS.

1. *Constitution.* The Act of 1870, c. 13, to prohibit the carrying of deadly weapons, is constitutional. *Andrews* v. *State*, 165.

2. *Same. Right to bear arms. Common defense.* The right to bear arms for the common defense, does not mean the right to bear them ordinarily or commonly, for individual defense, but has reference to the right to bear arms for the defense of the community against invasion or oppression. *Ib.*

3. *Same. Right to keep and use.* The citizen has, at all times, the right to keep the arms of modern warfare, and to use them in such manner as they may be capable of being used without annoyance and hurt to others, in order that he may be trained and efficient in their use. *Ib.*

4. *Same. Regulation of. Arms of warfare.* The right to keep arms of warfare can not be prohibited by the Legislature under the permissive clause of the Constitution of 1870, allowing the Legislature to *regulate* the "*wearing*" of arms. The use of such arms may be restricted as to manner, time or place, due regard being had to the right to keep and bear, for the constitutional purpose, but can not be prohibited. *Ib.*

5. *Same. Right to prohibit other arms.* The right to keep or bear other arms, not being protected by the Constitution, may be absolutely prohibited. *Ib.*

6. *Act of* 1870 *construed.* It is not every removal of a pistol or other weapon from place to place, that constitutes a "carrying" within the meaning of the Act of 1870, c. 13, which prohibits carrying arms. To constitute the offense, the weapons must be carried as "arms." *Page* v. *State*, 198.

7. *Same. A journey.* Under the Act of 1870, c. 13, prohibiting the carrying of pistols, &c., but excepting from its provisions persons on a journey out of their State or county, it is not every going out of the county that constitutes a journey. A party who carries the prohibited weapons when traveling around in the neighborhood of his home, though in an adjoining county, is not within the exception of the act. *Smith* v. *State*, 511.

ARMS—*Continued.*

8. Where the defendant started on a journey which might take him out of the county, or terminate within it, and where he armed himself, after the journey had terminated within the county, and when he was on his return and within a few miles of home, it was held a violation of the Statute. *Lacefield* v. *State*, 514.
See CRIMINAL LAW, INDICTMENT, 20.

ASSAULT.

See CRIMINAL LAW, INDICTMENT, 8, 9. *Collins* v. *State*, 14. *Fowler* v. *State*, 154.

1. *Assault to murder. Lying in wait, evidence.* On an indictment for an assault with intent to commit murder in the first degree, it is error to charge that an assault by "lying in wait," is as matter of law, deliberate, &c. It is evidence of deliberation, &c., but the deliberation, &c., is not a conclusion of law, but a question of fact. *Floyd* v. *State*, 342.

2. *Evidence of design to kill.* Where four negroes, after a rencounter with two white men and a negro, followed them, armed with guns, with an expressed purpose to kill the negro and to have revenge on the white men, and went to the house where the negro lived, and enquired for him; when they were confronted by the white men and asked, "what's up now?" when one of the prisoner's party said, "Nothing, G—d d—n it, we will show you," and fired; it was held, that the evidence not establishing a specific intent to kill the prosecutor, and the shooting being so sudden that there was no time for consultation between the person firing and the prisoner, the previous design to kill the particular individual assaulted was not established as to the party; and that the intent, if formed in the mind of the individual assailant, was not brought home to the prisoner by any expression or act of his at the time of the shooting. *Maxwell* v. *State*, 420.

COHABITATION.

1. *Felonious.* See CONSTITUTIONAL LAW, 15; CRIMINAL LAW, INDICTMENT, 19, 46. Grand Jury can not send for witnesses in. *Robeson* v. *State*, 266.

2. Indictment need not charge to be knowingly. *Ib.*

DOUBT.

Reasonable doubt applies in misdemeanor cases as in felonies. *Purkey* v. *State*, 26.

DRUNKENNESS.

1. *Indictable.* Since the adoption of the Code, a single act of public drunkenness is indictable. *State* v. *Smith*, 465.

2. *No Excuse for crime.* A charge that, if the defendant, indicted for larceny, was so much under the influence of whisky as not to be conscious of what he was doing when he took the gun, then he would

DRUNKENNESS—*Continued.*

not be in a condition of mind to be guilty of larceny; was more favorable than the prisoner was entitled to, in view of his being voluntarily drunk. *Henslie* v. *State*, 202.

ELECTION GROUND.

Selling liquor near. Under the Act of 1869-70, c. 22, s. 4, prohibiting giving away or selling liquor, on election day, *near* an election ground, a gift or sale within one mile, or one mile and a quarter, of such election ground, is clearly prohibited. *Manis* v. *State*, 315.

EMBEZZLEMENT.

1. A mere failure to pay over State Revenue is evidence of embezzlement. *State* v. *Cameron*, 78.

2. *State Revenue. Felony in failing to pay.* In an indictment against a Revenue Collector under the Act of 1860, c. 161, s. 3, for felony in failing to pay revenue into the Treasury, the venue is properly laid in the county in which the accused was Collector. *Gibbs* v. *State*, 72.

3. *Offense of omission.* This offense is one of the will, to be ascertained from passive conduct in failing to take or send the money to the Treasury. *Ib.*

GAMING.

A Prize Candy sale is gaming. *Eubanks* v. *State*, 488.

GRADE OF OFFENSE.

Determined by amount of punishment. *Robeson* v. *State*, 266.

HORSE STEALING.

1. *Verdict. When capital.* Under the Act of 17th May, 1865, c. 5, s. 1, horse stealing is capital, in all cases where the jury do not commute the punishment; and a simple verdict of guilty is sufficient for the infliction of the death penalty. *Turner* v. *State*, 452.

2. *Act of* 1865, *c.* 5. *Repeals Code* 4686. The first section of the Act of 17th May, 1865, c. 5, making horse stealing capital, is a repeal by implication, of the Code, 4686, as to all offenses committed since its passage. The effect of the 4th section is only to prevent the Act from operating as a statutory pardon of offenses committed before the Act. *Wilcox* v. *State*, 110.

3. *Infamy.* The crime of horse stealing is not one of those to which infamy and its disqualifications are attached by the Code, 5226, 5227. *Ib.*

HOUSE BREAKING.

Act of 1865, *c.* 5, *s.* 2. House breaking, under the Act of May 17, 1865, c. 5, s. 2, means breaking into a mansion house. *Mathis* v. *State*, 127.

See CRIMINAL LAW, INDICTMENT, 31. *State* v. *Williamson*, 483.

INDICTMENT.

1. *How signed by Attorney General.* The official signature of the District Attorney General, to an indorsement on an indictment directing what witnesses shall be summoned, does not cure the want of a signature to the indictment itself. *State* v. *Lockett*, 274.

2. *Attorney General, pro tem.* The fact that an indictment is signed by an Attorney General, *pro tem.* whose appointment is not shown by the record, is not material after a verdict on a plea of not guilty: Code, 5242. *Vincent* v. *State*, 120.

3. *Entry of finding and return.* The entry of record of the return of the indictment into court is sufficient, without showing that it was into *open* court. *Maples* v. *State*, 408.

4. *Should state the actual offense.* The practice of sending bills in all cases of homicide, for murder in the first degree, reprehended by the Court. *Anderson* v. *State*, 86.

5. *Grand Jury. Power to send for witnesses.* The Act of 1869–70, c. 51, s. 1, allowing grand jurors to send for witnesses in cases of lewdness, does not extend to offenses under the subsequent Act of 1870, c. 39. *Robeson* v. *State*, 266.

6. *Grand Jury. Caption of indictment.* If the facts necessary to show the proper organization of a grand jury, appear, either in the face of the indictment, or in the caption of the record of the court, it is sufficient on motion to quash or reasons filed in arrest of judgment. *McBean* v. *State*, 20.

7. *Oath of Grand Jury.* It is sufficient in an indictment, after showing that the Grand Jury was sworn, to aver that the Grand Jurors, &c., *do* present and say," without the words "upon their oaths aforesaid." *Ib.*

8. *Attempt to poison.* A charge of an "attempt to give and administer poison, by purchasing it and placing it in the hands of the defendant's minor son, advising and directing him to administer it," is sufficient in an indictment for an attempt to administer poison, under the Code, 4626. *Collins* v. *State*, 14.

9. *Same. Assault.* It is not necessary to charge an assault in an indictment for an attempt to poison. *Ib.*

10. *Illegible or doubtful writing.* The court, when a word in an indictment is equivocal, as if it be doubtful whether it be impanelled or impounded, will read it to make sense rather than nonsense. *Williams* v. *State*, 376.

11. *Impounded for impanelled.* The substitution of the word impounded for impanelled, in the caption of an indictment, would not be error for which a court would reverse. *Ib.*

INDICTMENT—*Continued.*

12. *Same. Unlawfully, not necessary in murder.* The word "unlawfully" is not necessary to describe the offense of murder in the first degree. *Riddle* v. *State*, 401.

13. *Presentment. Must state facts, not conclusions of law.* A presentment charging that the defendant did wilfully, &c., assume to be a Justice of the Peace, and did take upon himself to act as such, not being a "*legal qualified*" Justice of the Peace, without showing wherein his want of legal qualification consists, is bad. *Daniel* v. *State*, 257.

14. *Affray. Public place.* An indictment for an affray charging a fighting in a public place, is good without further description of the place. *Wilson* v. *State*, 278.

15. *Malicious Threats.* Under the Code, 4633, an indictment is sufficient which charges that the defendant did maliciously threaten O. G. M. B. that he should suffer the consequences, (meaning that he would kill him, or do him some great bodily harm, then and there pursuing him with a pistol,) unless the said O. G. M. B, against his will, should leave Smith's X Roads, with intent, &c. *State* v. *Morgan*, 262.

16. *Averment of malice.* The fact that an animal killed is described as the property of the general owner, does not restrict the proof of malice, to malice against him, but will admit the proof that the malice was at the special owner. *Stone* v. *State*, 457.

17. *Perjury.* An indictment for perjury must contain either an averment that the matter sworn to is material, or must show it by averment of the necessary facts. The statement of those facts, as part of the matter sworn to by the defendant, is not sufficient. *State* v. *Bowlus*, 29.

18. *Same. Assignment on affidavit for attachment.* In an assignment of perjury on an affidavit for an ancillary attachment, there must be the averment of materiality, or an averment of the existence of a suit to which the attachment sought was to be ancillary. It seems that if the attachment upon the allegations of the indictment would be wholly void, the assignment of perjury in the oath to obtain it, is bad. *Ib.*

19. *Alternative averments.* An indictment or presentment, under the act of 1870, c. 39, for cohabitation of a white person with a negro, charging in the alternative, that J. R. was a negro, mulatto, or person of mixed blood, to the third generation inclusive," is bad. *Robeson* v. *The State*, 266.

20. *Averment in the disjunctive, bad.* A charge that the defendant "did carry a belt, *or* pocket pistol, *or* revolver," is bad for uncertainty. *The State* v. *Green*, 131.

21. *Joinder of offenses.* An indictment for mayhem may charge in the same count that the defendant did "slit, cut off and bite off the ear," &c. *State* v. *Ailey*, 8.

INDICTMENT—*Continued.*

22. *Joinder of offenders and offenses.* An indictment against two persons for assault and battery upon three persons, is good. *Fowler* v. *The State*, 154.

23. *Duplicity.* An indictment for horse stealing which charges in the same count that the defendant did *take* and *steal* one mule, &c., is not double; the statute making it indictable to "take or steal." *Wilcox* v. *State*, 110.

24. *Selling liquor at elections. Duplicity.* An indictment or presentment is not double, which charges that the defendant "did, on election day, sell, give, vend and retail, spirituous, vinous and fermented liquors, to T. W., near the election ground." *State* v. *Irvine*, 155.

25. *Same.* Such presentment is good, without charging that an election was held. The charge that it was on election day sufficiently charges that the election was held. *Ib.*

26. *Rape. Averment of sex.* An indictment for rape need not state by express averment that the person injured was a female. The feminine pronoun "her," sufficiently indicates the sex. *Hill* v. *State*, 317.

27. *Same. Averment of age.* An indictment for rape need not state that the party injured was over the age of ten years. *Ib.*

28. *Description. Color and sex.* If the indictment describe the animal stolen, by color and sex, the color and sex must be proved as laid, but such description is unnecessary. *Turner* v. *State*, 452.

29. *Same. Color. Proof of.* Where the indictment described the animal as a bay, proof that the animal was a bay or red sorrel, was held sufficient to support a verdict of guilty. *Ib.*

30. *Averment of time.* The Code, 5124, does not dispense with the statement of time in an indictment; it only allows a more general statement. *King* v. *State*, 148. See *State* v. *Donaldson*, 48.

31. *Same.* Where the indictment, found in July, charged the offense as committed on the ——— day of April, of the same year, it was held good: *State* v. *Wills*, 148, *note.*

32. *House breaking.* An indictment for house breaking with intent to commit a felony, must set out and define the felony intended to be committed. *State* v. *Williamson*, 483.

33. *What must be set out.* It is not necessary, in an indictment for profanity and blasphemy, to set out the whole conversation in which the offensive words occurred. *State* v. *Steele*, 135.

34. *Repetition of defendants' names.* An indictment, after charging the several defendants by name, with an assault and battery on the prosecutor, proceeded, "*they the said,*" (omitting to repeat their

names) "*then and there having in their possession certain pistols,*" &c., with intent to intimidate, &c. Held that the omission to repeat the names was not material, and that the indictment sufficiently charged a felony under the Code, 4628. *State* v. *Brown*, 1.

35. *Larceny. Allegation of value, General.* In an indictment for larceny, a charge of stealing two hams, two shoulders and eight jowls, weighing one hundred pounds, of the value of fifteen dollars, was held sufficient, the verdict being general. *Taylor* v. *State*, 460.

36. *Larceny. Value of Notes. Proof of.* If it be necessary to prove that United States treasury notes stolen have value, it is sufficient proof of value, that the defendant declared that he had spent them. *Vincent* v. *State*, 120.

37. *Description of U. S. notes, &c.* In an indictment for larceny, the description of the articles stolen, as "One five and one two dollar greenback bill, United States currency, National Bank bills and money," is bad. *Lewis* v. *State*, 333.

38. *Robbery includes larceny.* A party indicted for robbery, may be found guilty of simple larceny. *Tucker* v. *State*, 484.

39. *Feloniously. Equivalent words.* A charge in an indictment, that the act was done "with intent to commit felony," is equivalent to a charge that it was done "feloniously." *Dillard* v. *State*, 260.

40. *Same. Assault to commit rape.* An indictment for assault, with intent to ravish, which charges the assault to have been made with intent to commit a felony, instead of charging that the defendant feloniously made an assault, is good. *Ib.*

41. *Technical words. Feloniously.* An indictment for murder is good without the use of the words *feloniously* or *unlawfully*. *Riddle* v. *State*, 401; *Williams* v. *State*, 376.

42. *Assault to Ravish. Feloniously.* In an indictment for an assault with intent to ravish, it is not necessary to charge that the assault was feloniously made. *Jones* v. *State*, 445.

43. *For murder, need not describe wound or weapon.* An indictment for murder, which does not specify the weapon used, or describe the wound inflicted, is good. *Alexander* v. *State*, 475.

44. *Murder in first degree.* An indictment for murder in the first degree need not use the words "murder in the first degree." If it use the descriptive words essential to the offense, it is good. *Williams* v. *State*, 37.

45. *Form of.* Form of indictment held sufficient. *Ib.*

46. *Cohabitation need not be charged to be knowingly.* The act of 1870, c. 39, s. 1, prohibits the intermarriage, &c., of whites and negroes.

INDICTMENT—*Continued.*

The 2d section declares, that "knowingly" to violate these provisions, is felony. Held that an indictment need not charge the act to be "knowingly" done. *Robeson* v. *State*, 266.

47. *Disturbing public worship.* A presentment for disturbing public worship, which does not charge the acts committed, to have been "wilfully" done, is bad. *State* v. *Townsell*, 6.

48. *Same.* An indictment or presentment under the Code, 4853, for disturbing public worship, need not aver that the act was done "*at or near*" the place of worship. *Warren* v. *State*, 269.

49. *Conclusion* contra pacem. The constitutional provision, Art. 6, s. 12, that indictments shall conclude, "against the peace and dignity of the State," is imperative, and makes those words essential to the validity of an indictment. *Rice* v. *State*, 215.

50. *Same. Not required in each count.* It is not necessary that each count of an indictment have this formal conclusion; if the whole so conclude, it is sufficient. *Ib.*

INSANITY.

1. *Opinions of unprofessional witnesses.* In criminal cases unprofessional witnesses may be asked, after giving the circumstances and conduct of the party, to state their opinion as to his sanity; and the exclusion of such evidence offered by a defendant, is error. *Dove* v. *State*, 348.

2. *Practice. Hypothetical case. When to be submitted.* It is not error for the court, on a trial for murder, where insanity is set up as a defense, to require the defendant to submit his hypothetical case to his professional witnesses, before the rebutting evidence of the State is heard on the question of insanity. If evidence materially varying the hypothetical case, is afterwards introduced, the defendant must ask leave to re-examine as to the new matter. *Dove* v. *State*, 348.

3. *Error. Must be material.* If the new proof does not make any change in the hypothetical case submitted, the defendant would not be injured by the refusal. *Ib.*

4. *Quantum of proof. Doubts.* A charge that "the proof of insanity must be as clear and satisfactory, in order to acquit, as the proof of the crime ought to be to find a sane man guilty;" or to charge that if the jury have a reasonable doubt as to the the insanity of defendant, they ought to convict, is error. *Ib.*

5. *Same Quantum of capacity.* No person can be guilty of murder who has not sufficient discernment to distinguish between good and evil, and who has no consciousness of doing wrong in the act he is committing. *Ib.*

INSANITY—*Continued.*

6. Question of insanity need not be left to jury where there is no proof. *Henslie* v. *State*, 202.

INTOXICATION.

See CRIMINAL LAW, DRUNKENNESS. *Henslie* v. *State*, 202.

JURY.

Grand. See CR. LAW, INDICTMENT, 5, 6, 7.

Petit. Challenge. See CRIMINAL PRACTICE, *Link* v. *State*, 252. CONSTITUTIONAL LAW, 10, *Gibbs* v. *State*, 72. ERROR, *Riddle* v. *State*, 401.

KILLING A HORSE.

Malice at special owner. Killing a horse, with malice at the bailee of the animal, constitutes the offense described in the Code, 4657, though there be no malice at the general owner. *Stone* v. *State*, 457.

LARCENY.

1. *General Verdict.* A general verdict, in larceny, on an indictment charging the stealing of articles of more than ten dollars in value, is a verdict of grand larceny. *Taylor* v. *State*, 460.

2. Grade of offense determined by term of imprisonment. *Robeson* v. *State*, 266.

3. *Recent possession.* It is error to charge the jury, that 'recent possession of property proved to have been stolen, unexplained, and in the absence of previous good character, is plenary proof of guilt, and the jury can have no reasonable doubt.' *Wilcox* v. *State*, 110.

4. *Possession obtained by fraud* Obtaining property by a fraudulent device, as "the five cent trick," is larceny. *Defrese* v. *State*, 53.

5. *Bailment or agency.* The Code, 4679, which makes it larceny to use any bailment or agency merely as the means of procuring possession of property, with an intent at the time to make a fraudulent appropriation thereof, is only a return to the principles of the common law. *Ib.*

MANSLAUGHTER.

Doubt as to intent. In a conviction for voluntary manslaughter, where the facts set out in the bill of exceptions left it doubtful whether the act from which the death resulted was accidental or designed, the conviction was held bad. *Anderson* v. *State*, 86.

MURDER.

1. *Provocation.* Words or conduct calculated to induce the belief that the deceased intended to provoke a difficulty, are not such provocations as will reduce a killing from murder in the second degree to manslaughter. *Williams* v. *State*, 376.

MURDER—*Continued.*

2. *Self-defense.* To excuse a killing on the ground of self defense, the danger to the defendant must be real, or honestly believed to be so, on sufficient grounds. *Williams* v. *State*, 376.

3. *Same.* Past threats or conduct of the deceased, how violent soever, will not excuse a homicide without sufficient present demonstration to authorize the belief that the deadly purpose then exists, and the fear that it will be then executed. The danger must be present, apparent and imminent, and the killing must be done under a well-founded belief that it is absolutely necessary for the defendant to kill at that moment, to save himself from a great or like injury. *Ib.*

See CRIMINAL LAW, INDICTMENT, 4, 12, 41, 43, 44, 45.

PLEADING.

Under the Act of 1860, c. 102, allowing double pleading in criminal cases, the several pleas must be put in so as to be tried at the same time. *Crippen* v. *State*, 25.

POISON.

Proof of. On a trial for poisoning, proof that the party injured was *poisoned* with a drug named, is sufficient to show that the drug used was *poison.* *Maples* v. *State*, 408.

Attempt to. See CRIMINAL LAW, ASSAULT. *Collins* v. *State*, 14.

PRACTICE.

1. *Motion to quash.* A motion to quash, if available, on error, must be upon specific grounds, stated of record. *Henslie* v. *State*, 202.

2. Prisoner may argue cause, but can not give evidence. See CONSTITUTIONAL LAW. *Wilson* v. *State*, 232.

3. *Production of papers in evidence.* Money orders, alleged to have been stolen, if in court, must, on demand of the prisoner, be submitted to the jury. *Rice* v. *State*, 215.

4. *Trial without plea. New trial.* Where there is a trial without a plea of not guilty, the court may, on the motion of the prisoner to arrest the judgment, set aside the verdict and order a new trial. *Link* v. *State*, 252.

5. *Former conviction.* In such case, the record will not support a plea of former conviction. *Ib.*

6. *Prisoner standing mute, entitled to panel and challenges.* Where, in such case, the facts were submitted to the court and determined not to support the plea, and the prisoner being ordered to plead over, on his arraignment stood mute, and the court ordered the plea of *not guilty* to be entered: held that the prisoner was entitled to the usual panel and challenges, and the court could not order the traverse jury to be sworn to try his case, against the consent of the prisoner. *Ib.*

7. *Waiver. Replication.* If a defendant in a misdemeanor, go to trial,

PRACTICE—*Continued.*

without a replication to a plea of former conviction, it is a waiver of the defense. *McBean* v. *State*, 20.

8. *Same.* If a term of court is irregularly begun, a prisoner waives the irregularity by going to trial without taking the objection. *Henslie* v. *State*, 202.

9. *Negligence.* Where a plea of former conviction was filed at one term, and no replication was filed, and the trial was had at the next term on a plea of not guilty, affidavits of the defendant, and his counsel who filed his plea, that said counsel was engaged in another court when the trial began, and that defendant, with new counsel, had gone into the trial under the belief that it was another cause against the same party, was held to be no ground for a new trial. *McBean* v. *State*, 20.

10. *Reasons in arrest of judgment.* The proper practice, where a party seeks to arrest a judgment, is to file reasons in arrest, pointing out specially the alleged defects in the proceedings. *State* v. *Steele*, 135.

See CRIMINAL LAW, INSANITY, 2, 3.

PROFANITY AND BLASPHEMY.

When public, indictable. Profane and blasphemous language, in a public place, in the presence and hearing of divers citizens, is indictable. *State* v. *Steele*, 135.

PROSECUTOR.

1. *Omission to mark. What is.* Where an indictment is marked "no prosecutor necessary," evidently because there was a coroner's inquest and verdict; held, that the want of a prosecutor was cured by the Code, 5242, though the inquest was not sufficient to authorize the indictment. *Dove* v. *State*, 348.

RECORD.

1. *Several indictments in same transcript.* Where three indictments for murder appeared in the transcript, and it did not appear in any manner on which of them the defendant was tried, the conviction was held bad. *Anderson* v. *State*, 86.

2. *Same.* There being two indictments in the record, and it not appearing which of them the prisoner was tried upon, one being invalid, purporting to have been found at a time when no court was held, it was held that the conviction was upon the other. *Vincent* v. *State*, 120.

On change of venue, see CRIMINAL LAW, VENUE. *Logston* v. *State*, 414.

THREATS, MALICIOUS.

See CRIMINAL LAW, INDICTMENT, 15.

VENIRE FACIAS.

1. *Signed by Judge.* A *venire facias* issued and signed by the Judge of the Criminal Court of Montgomery county, under the Act of July, 1870, c. 115, to create that court, is good. *Lewis* v. *State*, 333.

VENIRE FACIAS—*Continued.*

2. *Juratores. Not process.* A *venire facias juratores* is not process within the meaning of the Constitution, Art. 6, s. 12, and may be issued and signed by the judge, of a court which is authorized to appoint the jurors, and "to cause them to be summoned." *White* v. *State*, 338.

3. *Venire. Want of, not material. Costs of defective transcript.* The omission of the *venire facias* in the transcript sent up to the Supreme Court, is not error, and the Court will proceed to judgment without it. But it is a fault in the Clerk to omit it from the transcript, for which his costs will be struck out. *Sible* v. *State*, 137.

VENUE.

1. *Constitution.* Code 5125, dispensing with the allegation of venue, is not in violation of the Constitution, Art. 1, sec. 9. *State* v. *Quartemus*, 65.

2. *Offenses committed beyond the State.* The provision in the Code, 4981, for the punishment of offenses committed within five miles of the State line, on board of vessels engaged in navigating waters of the State, is unconstitutional. *Craig* v. *State*, 227.

3. *Time. Need not be charged.* Time and place of committing an offense need not be stated in an indictment, unless they are material ingredients of the offense. *State* v. *Donaldson*, 48.

4. *Indictment need not state.* Venue need not be averred in an indictment for a capital offense: Code, 5125. It is sufficient if the proof show the offense to have been committed in the county. *Williams* v. *State*, 37.

5. *Proof of.* Venue may be proved by reasonable inference from facts shown. *Maples* v. *State*, 408.

6. Where a new county is created, all offenses previously committed in the included territory, must be tried in the new county. *State* v. *Donaldson*, 48.

7. Venue may be stated as in the new county. *Ib.*

8. *Bill of Exceptions must state.* The Code, sec. 5242, sub-sec. 9, curing the omission of venue in a Bill of Exceptions, is not valid. *Mayes* v. *State*, 430. *Alexander* v. *State*, 475.

9. *Change of. Order for.* On the entry of the order changing the venue in a criminal case, the jurisdiction of the court to which the venue is changed attaches, subject to the right of the court making the order, to vacate it during the term at which it is made. The filing of the transcript is matter of evidence. *Logston* v. *State*, 414.

10. *Same. Filing Transcript.* If a transcript is filed with the indictment, sufficient to show the jurisdiction of the court to proceed,

VENUE—*Continued.*

the trial may, in the absence of objection go on, and any deficiencies in the transcript may be afterwards supplied by *certiorari*. *Ib.*

See *Gibbs* v. *State*, 72.

VERDICT.

1. *Effect of, in Supreme Court.* Where the questions involved in a trial below are mainly dependent on the credit of witnesses, much weight is to be given in the revising court to the action of the court and jury. *Jones* v. *State*, 445.

2. *Same.* Court to reverse must see that there is error. *Hill* v. *State*, 317.

3. *Power of Court to enter.* A Circuit Judge, having erroneously directed a jury that their verdict fixing a term of imprisonment at two years and six months, was bad, sent them out, when they fixed the term at three years. Discovering his error, he entered the verdict for the term which the jury first returned, and pronounced judgment. Held good. *Henslie* v. *State*, 202.

4. *Several counts.* A general verdict on an indictment containing several counts, will be referred to the count which will sustain the conviction. *Taylor* v. *State*, 460.

5. *On good and bad counts.* Where there are good and bad counts in an indictment, upon a general verdict of guilty, the Court will presume that the finding is responsive to the good and not the bad counts. *Rice* v. *State*, 215.

6. *Same.* Where the proof is set out, and relates to the bad count only, the judgment should be arrested. Where it relates equally or properly to both, the verdict and judgment will be good. *Ib.*

WAIVER.

See CRIMINAL PRACTICE, 7. *Dove* v. *State*, 348; *McBean* v. *State*, 20. COURTS, 2. *Henslie* v. *State*, 202. COURTS, SPECIAL, 3.

DECREE.

See CHANCERY PRACTICE. *Saunders* v. *Gregory*, 567.

DEVASTAVIT.

See ADMINISTRATION.

DISTRIBUTEE.

May aid in setting up sale to establish conversion. Where a bill is pending by a purchaser of land to enforce his contract, an agreement by a distributee of the estate of the vendor to furnish a deposit to prevent the dismissal of the bill, is not fraudulent on account of his relation to the estate, but his interest being to set up the sale and conversion, he might well aid the suit. The withdrawal of the distributee from such combination would form a valid consideration for a compromise with the heir. *Reynolds* v. *Brandon*, 593.

See LEGATEE. PAYMENT, *Stewart* v. *Glenn*, 581.

DISTURBING PUBLIC WORSHIP.

See CRIMINAL LAW, INDICTMENT, 47, 48. *State* v. *Townsell*, 6. *Warren* v. *State*, 269.

DOUBT.

1. *In misdemeanor.* Reasonable doubt applies to misdemeanors, as well as felonies. *Purkey* v. *State*, 26.

2. Defined. *Ib.*

See ERROR. CRIMINAL LAW, INSANITY, 4.

DRUNKENNESS

1. Indictable. See CRIMINAL LAW. *State* v. *Smith*, 465.
2. No excuse for crime. *Henslie* v. *State*, 202.

ELECTION GROUND,

Selling liquor near. See CRIMINAL LAW. *Manis* v. *State*, 315. *State* v. *Irvine*, 155.

EMBEZZLEMENT.

Failure to pay is. See CRIMINAL LAW. *Cameron* v. *State*, 78.
Venue in. *Gibbs* v. *State*, 72.
Character of offense. *Ib.*

ERROR.

1. *Failure to charge. Request.* A charge not asked for in a capital case, need not be given. *Williams* v. *State*, 376.

2. *Not presumed.* In the absence of a bill of exceptions, it will be presumed that there was full proof to justify a conviction. *Sible* v. *State*, 137.

3. *Must appear.* To obtain a reversal in a court of errors, error must be affirmatively shown. *Turner* v. *State*, 452; *Hill* v. *State*, 317.

ERROR—*Continued.*

4. *Charge of Court. Instructions as to evidence.* It is error for the Court to charge the jury that "when there is conflicting testimony it is for you to determine, under your oath, who, and what testimony, you will believe," without more. He must instruct them as to the rules by which testimony is to be weighed. *Wilcox* v. *State*, 110.

5. *Same. Error, to misapply presumption.* In a case where it is doubtful on the proof whether the act of the defendant from which the death happened was not accidental, it is held error in the Court to charge, that if a party use a deadly weapon and kill, he is presumed to have intended to take life. *Anderson* v. *State*, 86.

6. *Same. Doubts.* A charge in a misdemeanor case, that the State need not show the parties guilty beyond a reasonable doubt, but that the proof must show the guilt of the defendants to their "reasonable satisfaction," that their best judgments must be that the defendants are guilty, so that the mind may rest easy, in the conclusion of guilt, is not error. *Purkey* v. *State*, 26.

7. *In charge. Plea, for defense.* It is not error for the court, in his charge, to speak of the defense of insanity set up, as a plea of insanity put in. *Dove* v. *State*, 348.

8. *Same. As to matter not controverted.* In a case where the killing is proved beyond question, for the judge to charge the jury that the plea of insanity put in, (the defense of insanity,) was an admission of the killing, is not error. *Ib.*

9. *Should apply the law to the facts.* It is the duty of the Circuit Judge to apply the law to the facts of the case, so as to facilitate the investigation of the case by the jury. *Anderson* v. *State*, 86.

10. *Charge not required on matters not involved.* On an indictment for murder in the second degree, and a conviction for murder in the second degree, a failure to charge upon the law of involuntary manslaughter will not be considered error, unless the facts show that such a charge would have been pertinent to the case. *Williams* v. *State*, 376.

11. *On questions not pertinent to proofs.* Where the charge is grand larceny, and there is no proof of a larceny of less than $10, but the whole proof relates to a larger value, it is not necessary for the court below to charge upon the discretionary power of the jury to fix a punishment in the county jail. *Taylor* v. *State*, 460.

12. *On hypothetical case.* An error in the charge of the court below, which has no application to the facts proved, is not a ground of reversal. *Wilson* v. *State*, 278.

13. A charge right as applied to the evidence in the cause, but erroneous in the abstract, is not a ground of reversal. *Hulme* v. *Brown*, 679.

14. *On point not raised by proof.* In the absence of proof of mania, it is

held not to be error to charge that it makes no difference as to the prisoner's guilt, what sort of an impulse controlled him, nor how strong that impulse was, nor what produced it. *Henslie* v. *State*, 202.

15. *Receiving Stolen Goods. Intent.* A charge that, if the prisoner received the property, knowing it to be stolen, he was guilty of a crime, is erroneous, unless it further state that he must have fraudulently intended to deprive the owner thereof. *Rice* v. *State*, 215.

16. *Description of matter read.* It is not a ground of exception to the charge of the Circuit Judge that the bill of exceptions shows that he read certain sections of the Code, designated by their numbers, without setting out the sections at large in the bill of exceptions. *Logston* v. *State*, 414.

17. *Reference to Statute.* If the bill of exceptions show that the judge read "the Act on which the indictment was founded," without further description, it is sufficient without setting it out in words. *Turner* v. *State*, 452.

18. *Effect of Verdict.* After verdict in a case of felony, the court must see that the verdict is erroneous, before they will reverse on the facts. *Hill* v. *State*, 317. Especially where it is on conflict of proof. *Jones* v. *State*, 445.

19. *Erroneous Judgment. Misdemeanor.* If the court below pronounce an erroneous judgment, this court will enter the proper judgment; as where the court below improperly arrest the judgment on a conviction for misdemeanor, this court will pronounce sentence. *State* v. *Steele*, 135.

20. *Judgment of the Supreme Court.* It seems that if the court below pronounce an erroneous judgment on a verdict, this court can pronounce the proper judgment. *Wilcox* v. *State*, 110.

21. *Same.* If the prisoner had been sentenced for the three years' term, when the term should have been two and a half years, it would have been error, for which the judgment should have been reversed or the judgment corrected by this court. *Henslie* v. *State*, 202.

22. *New Trial. Juror Disqualified. Affidavits.* The Circuit Court refused a new trial upon affidavits showing that a juror made statements before the trial showing that he had formed and expressed an opinion, and was otherwise prejudiced against the prisoner, though it was not shown upon what ground the opinion was based; nor was it shown what he stated on his examination as a juror, no evidence being introduced on the part of the State to explain the facts; held, error. *Riddle* v. *State*, 401.

23. *Same. Want of Diligence.* A new trial will not be granted, to enable a defendant to procure evidence of which he was cognizant before

ERROR—*Continued.*

the trial, where he has made no effort to procure a continuance that he might obtain the testimony. *Vincent* v. *State*, 120.

24. *Same. Error in admitting, must appear.* The exclusion or admission of a witness as incompetent being a matter for the court, this court would not reverse, where, upon the whole case, they were satisfied that the witness was competent, though there was no direct evidence on that point. *Dove* v. *State*, 348.

See CHANCERY PRACTICE, 7. CRIMINAL LAW, INSANITY, 3; *Dove* v. *State*, 348. CRIMINAL LAW, PRACTICE, 1. CRIMINAL LAW, VERDICT. EVIDENCE, 2, 3.

EQUITABLE ASSETS.

See ADMINISTRATION.

EQUITABLE SET-OFF.

See SET-OFF.

ESCHEAT.

Act of 1850, *c.* 54, *valid.* The lands of an unnaturalized resident, which were sued for by the State as escheated, and the suit dismissed under the third section of the act of 1850, c. 54, by virtue of that act vested in the widow of such resident. *Garretson* v. *Brien*, 534.

EVIDENCE.

1. *Admissions or Declarations.* The declarations or admissions of a co-defendant or third person, in regard to the commission of an offense, when made after the offense is committed, are not admissible as evidence for a defendant. *Sible* v. *State*, 137.

2. *Admission without exception, not error.* The admission of illegal evidence without exception at the time, it being subsequently excepted to and excluded, is not error. *Preswood* v. *State*, 468.

3. *Error. Exception must be taken below.* The action of the court in the admission or rejection of evidence, not excepted to, can not be made a ground of reversal. Where the record shows that the court, among other things not excepted to, charged, &c., it will be presumed that any material point not shown in the charge was given among the matters not excepted to. *Williams* v. *State*, 376.

4. *Witness. Age and capacity.* A witness of tender years being asked if he knew what would become of him if he swore a lie, answered, "that the bad man would get him." *Held:* That in view of his intelligence, as shown by his evidence in chief, he was properly admitted as a witness. *Logston* v. *State*, 414.

5. *Same. Want of understanding.* An illiterate colored witness, of the age of 13 or 14, stating, on examination as to her capacity, that if she

EVIDENCE—*Continued.*

swore a lie she would go to the bad world, held competent to testify. *Vincent* v. *State*, 120.

6. *Same. Competency. Proof of.* The State introduced a witness not bearing the name of the defendant, and the defendant objected to her competency, that she was his wife; but refused to examine her on her *voir dire*, and objected to her examination by the State. *Held*, that an offer to prove marriage "by reputation, cohabitation, conduct, and acknowledgment of the parties that they were man and wife," was properly refused. The defendant was bound to produce the best evidence, or account for its absence. *Dove* v. *State*, 348.

7. *Motives of Witness.* Where there is a material discrepancy in the statements of witnesses, if one witness has a strong motive, as to forestall a prosecution against himself, to misstate, or give a coloring to the facts, while the other is free from any apparent motive, these are circumstances to be weighed in considering the effect of the evidence, which may cause the latter to overweigh the former witness. *Maxwell* v. *State*, 420.

8. *Same. Discrepancies in statements of witnesses.* Immaterial discrepancies in the statements of witnesses, do not affect their credibility, unless there is something to show that they originate in willful falsehood. *Vincent* v. *State*, 120.

9. *Substantive Felonies.* It is error to prove against a defendant a felony distinct from that for which he is on trial. *Wilcox* v. *State*, 110.

10. *Same. When admissible.* Upon the trial of an indictment for the murder of one person, the fact that other dead bodies were found at the same time and place with that of the person charged, is admissible, to negative the hypothesis that they were parties to the homicide. *Logston* v. *State*, 414.

11. *Same. To prove guilty knowledge.* Evidence of other acts of a prisoner may be admitted where a guilty knowledge is to be proved, though they amount to substantive felonies or attempts to commit felony. *Defrese* v. *State*, 53.

12. *Confessions. Inducements to confess, &c.* Where the prisoner, on his arrest, was told by one of the arresting party, "we know that you are not at the head of this, and if you will tell all about it, it will be best for you, and may release you;" whereupon the prisoner confessed; and on the next day, he went to a witness who did not have charge of the prisoner, and said he wanted to make a statement or confession about it, when he was told that he could not be compelled to tell, and if he did, he must do it voluntarily, and that his statements would be evidence against him; the confession made to the latter was held admissible. *Maples* v. *State*, 408.

13. *Same. When voluntary.* Where a prosecutor, pursuing a prisoner, came up with him in the road, drew his gun, and ordered him to

EVIDENCE—*Continued.*

halt, and his brother coming up, said the prosecutor ought to have shot the prisoner, when the prosecutor said to the prisoner he should not be harmed; and thereupon the parties proceeded two and a half miles, when the prisoner confessed. Held admissible in evidence. *Wilson* v. *State*, 232.

14. *Same. Discovery in consequence of. Rule as to.* A confession induced by improper means, may be used to the extent of showing that the prisoner had knowledge of the facts, to the discovery of which his confession has led; but his statements as to his connection with the facts as a participator in the crime, are not admissible against him. His knowledge of the facts puts it upon him to reconcile his knowledge with his innocence. *White* v. *State*, 338.

15. *Same. Declarations. Denying guilt, not error to admit.* Where the prosecutor, by means of promises, induced the defendant to show him stolen articles, and his declarations were received that he received them from another, not knowing that they were improperly obtained, the admission of the statement was held not to be error against the prisoner. *Rice* v. *State*, 215.

16. *Conversation. Introduction of part entitles adverse party to the whole.* Where the defendant examines a witness to prove a conversation with the prosecutor, the State may bring out the whole of the conversation so introduced, though it may involve statements concerning independent offenses. *Williams* v. *State*, 376.

17. *Deed. Proof of. Claim of title.* On the trial of an indictment for intruding into a church; Code, 4652; to allow an old unregistered deed, on proof of the signature of the maker, to be read, is not error. It is admissible to show claim of title, and with evidence of long continued possession, is proof of title. *McGuire* v. *State*, 104.

18. *Error. Must be material.* The exclusion by the Court, for want of a stamp, of evidence of a title bond, from a person claiming under the maker of the deed to the defendant, was not error, the evidence not being material. *Ib.*

19. Production of papers. Right of prisoner. See CRIMINAL LAW, PRACTICE. *Rice* v. *State*, 215.

20. Of insanity. See CRIMINAL LAW, INSANITY.

21. Of value in larceny. *Vincent* v. *State*, 120.

EXECUTION.

Quashing. See CERTIORARI. *Glover* v. *Holman*, 519.

EXECUTION SALE.

Dower in equity not subject to. A dower interest laid off, out of an equitable estate, is not subject to execution at law for the debt of the dowress. *Garretson* v. *Brien*, 534.

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EXECUTION.

Quashing. See CERTIORARI. *Glover* v. *Holman*, 519.

EXECUTION SALE.

Dower in equity not subject to. A dower interest laid off, out of an equitable estate, is not subject to execution at law for the debt of the dowress. *Garretson* v. *Brien*, 534.

EXECUTOR.

1. *Powers of, before probate and qualification.* A person named as executor may, notwithstanding the Code, 2201, before qualification, by virtue of his nomination, take possession of his testator's estate, and hold it for purposes of protection, preservation and management, during the interval that must elapse before probate and qualification. *Killebrew* v. *Murphy*, 546.

2. *Same. Widow. State of war.* A widow appointed executrix, with an interest in the estate, who could not prove the will on account of the prevalence of civil war, held to act in taking care of the estate as trustee and not as executor *de son tort. Ib.*

3. *Same. Same. Compensation to.* In such case, the widow would be entitled to an allowance for her services in taking care of and managing the estate during the continuance of the war, and until the grant of letters. *Ib.*

4. *Same. Money expended to prosecute murderer of husband.* Money expended by a widow, executrix, in such case, during the civil war, while civil law was suspended, to procure the arrest, trial and punishment of the murderer of her husband, held a proper charge against the estate. *Ib.*

5. *Liability of joint Executors.* Executors are not jointly liable upon their joint bond for the administration of equitable assets coming to the hands of one of them. *Fulton* v. *Davidson*, 614.

6. *When he acts as such; When as a receiver.* An executor appointed by a court to sell lands and slaves, or to receive the proceeds, acts as commissioner and receiver, and not as executor, and is not liable upon his bond as executor. One executor is not liable for the act of a joint executor in relation to such fund, unless he concur in the act. *Ib.*

7. *Same. Joint receipt. Solicitor drawing entry not estopped.* The fact that one executor was the solicitor who drew the order in a cause directing such a fund to be paid to the executors, and reciting that it was so paid, would not render him liable for the receipt of the moneys by the other executor. Nor would it estop him from showing that the moneys were in fact received by the other executor; and the facts being shown by the receipts filed with and made part of the decree, he was exonerated. *Ib.*

8. *Same. Mistake as to effect of order.* That the court making the order probably misapprehends the character in which a person receives a fund, and that he himself does so, and carries it into his settlement as executor, instead of accounting with the court from which he received it, can not control the legal effect of the facts and make a receipt by him, of funds arising from a sale, under decree, not directed by the will, an executorial act. *Ib.*

EXECUTOR—*Continued.*

9. *Same. Act of* 1838, c. 111, s. 18. *Trust must be by will.* To render executors and their sureties liable for the administration of a trust under the act of 1838, c. 111, s. 18, the trusts must arise under the will; not be imposed by the act of a court. *Ib.*

10. *Solicitor. Executor may claim compensation as.* An executor who is a solicitor, may claim solicitor's fees, as well as compensation as executor, if he perform the office of both. *Ib.*

11. *Liability for rents.* Executors charged by the will to make a crop on the testator's lands for one year after his death, are not responsible for the management of the real estate after that period, except so far as they assume control or receive rents. *Ib.*

See ADMINISTRATION.

FEES.

See CHANCERY SALE. *Fulton* v. *Davidson*, 614. COSTS, *Williams* v. *State*, 313. COUNSEL, *Wright* v. *State*, 256.

FORMER ACQUITTAL.

Identity of offenses. An acquittal on an indictment for embezzlement of revenue, by "falsely pretending that said revenue was taken from him (the defendant) by robbery," is a bar to a subsequent indictment for failing to pay over the same moneys. *State* v. *Cameron*, 78.

FORMER CONVICTION.

1. *Of A. & B. before J. P. no bar to charge of felony.* A plea of former conviction before a Justice of the Peace, under the small offense law, is not a good bar to an indictment for felonious assault. *Mikels* v. *State*, 321.

2. *Same. Verdict of not guilty of felony.* Such a plea being put in, and held bad on demurer, the defendant pleaded not guilty, and was convicted of assault and battery. Held that the conviction was good *Ib.*

3. *Same. How pleaded.* In such case the defendant should have pleaded not guilty to the felony, and former conviction to the assault and battery. *Ib.*

4. *Pleading.* A plea of former conviction, which avers that the former judgment was reversed, and the indictment thereupon dismissed, is bad.—*State* v. *Thurston*, 67. So a verdict set aside for want of a plea, will not support a plea of former conviction. *Link* v. *State*, 252.

5. *Judgment on demurrer to plea of.* The proper judgment on sustaining a demurrer to a plea of former conviction, is, that the defendant answer over. He may then plead a new or better plea of former conviction, or not guilty, or both. *Fulkner* v. *State*, 33.

FRAUDULENT CONVEYANCE.

Vendor retaining possession. The mere fact of a mortgagor remaining in possession of personal property, and of his afterwards disposing of it without the consent of the mortgagee, does not prove the deed fraudulent, or avoid it as to the lands conveyed in the same deed. *Saylors* v. *Saylors*, 525.

See CONFEDERATE NOTES. *McDonald* v. *Kirby*, 607.

GAMING.

See CRIMINAL LAW, PRIZE CANDY SALES. *Eubanks* v. *State*, 488.

HAMILTON COUNTY,

Court of. See COURTS.

HIRE OF SLAVES.

See ADMINISTRATION.

HUSBAND AND WIFE.

1. *Debts and distributive share. Set-off.* A note of a husband for property bought at an administrator's sale is not a proper set-off against a distributive share of the wife. *Stewart* v. *Glenn*, 581.

2. Relation of, among slaves. See MARRIAGE; *Andrews* v. *Page*, 653.

See CRIMINAL LAW. *Robeson* v. *State*, 266; *Lonas* v. *State*, 287.

ILLEGIBLE WRITING.

Construed, how. *Williams* v. *State*, 376.

INDICTMENT.

See CRIMINAL LAW, INDICTMENT.

INFAMY.

Horse stealing not infamous. *Wilcox* v. *State*, 110.

INFANTS,

Compromise for. See CHANCERY JURISDICTION. *Reynolds* v. *Brandon*, 593.

INNOCENT PURCHASER.

See CHANCERY PLEADING. *Saylors* v. *Saylors*, 525.

INSOLVENCY,

Suggestion of. See ADMINISTRATION. *Smith* v. *Slaughter*, 565.

INTEREST.

See CHANCERY PRACTICE. *Saunders* v. *Gregory*, 567, *Fulton* v. *Davidson*, 614.

INTERMARRIAGE.

See CRIMINAL LAW, COHABITATION. *Robeson* v. *State*, 266; *Lonas* v. *State*, 287.

JUDGE.

1. *Competency.* A Judge who, previous to his election as Judge, sent, as Attorney General, the bill of indictment against the prisoner, is not competent to sit upon the trial of that indictment. *Mathis* v. *State*, 127.

2. Dying without signing minutes. See RECORD. *Moore* v. *State*, 493.

See CONSTITUTIONAL LAW. *Ligan* v. *State*, 159.

May sign venire, if permitted by law. *Lewis* v. *State*, 333; *White* v. *State*, 338.

JUDGMENTS.

Void and Voidable. A judgment rendered before a Justice of the Peace, before the return day of the warrant, is not void, but erroneous. *Glover* v. *Holman*, 519.

JUDICIAL NOTICE.

1. *Of Courts being closed.* The courts will take judicial notice when the courts in a particular county were closed—civil law suspended and military power prevailing. *Killebrew* v. *Murphy*, 546.

2. *Belligerent occupation.* Whether a particular locality was held by one belligerent, or the other, at a particular time, is a question of fact to be determined upon proof, not upon judicial knowledge. *McDonald* v. *Kirby*, 607.

JURISDICTION.

1. *New County. Offenses before creation of.* If a county is divided, and a portion of its territory goes into the formation of a new county, a criminal act done before the division, within the ceded territory, can be prosecuted only within the new county. *State* v. *Donaldson*, 48.

2. *Same. Venue.* The charge, as to place, may state the offense in the new county. *Ib.*

3. *U. S. Cemeteries.* The jurisdiction of the United States over the United States Cemeteries, under the cession of 1867, c. 44, is not exclusive of the right of the State to punish offenses committed therein, nor of their right to serve process. *Wills* v. *State*, 141.

4. *Same. Same. Temporary occupation of adjacent ground.* During the temporary occupation of the adjacent ground, used by the United States forces while preparing the Cemetery grounds, the jurisdiction was exclusive in the United States, so that the State could not punish a misdemeanor committed therein during such occupation. *Ib.*

See COURTS, SPECIAL. *Dove* v. *State*, 348; *Robeson* v. *State*, 266; *Williams* v. *State*, 37. CRIMINAL LAW, VENUE, COSTS. *State* v. *Logston*, 276.

JUROR.

1. *Challenge. Peremptory, or for cause.* Where nine jurors had formed an opinion from rumor in a capital case, but the record did not show that the prisoner exhausted his peremptory challenges; held, that the prisoner was not entitled to the benefit of the question, whether the jurors were competent. As he does not challenge, he is held to accept the jurors. *Preswood* v. *State*, 468.

See CONSTITUTIONAL LAW, *Gibbs* v. *State*, 72. CRIMINAL LAW. ERROR. COURTS, SPECIAL, *Williams* v. *State*, 37.

LEGATEE AND DISTRIBUTEE.

Hire of Slaves. The hire of slaves, until probate of a will, belonged to the distributees. Upon probate of the will, the right to the hire from the death of the testator, belonged to the legatee of the slave. If the legatee had possession in the meantime, no one could recover the hire from him. *Killebrew* v. *Murphy*, 546.

See DISTRIBUTEE.

LIFE TENANCY AND REMAINDER.

Improvements not chargeable to remainderman. The cost of erections on the life estate of a widow, not necessary to the protection or preservation of the testator's estate; held not to be a charge against the estate of the testator, nor against the remainderman. *Killebrew* v. *Murphy*, 546.

LIMITATIONS, STATUTE OF.

A party indicted for a felony, which includes a misdemeanor, is, if the proof shows him not guilty of the felony, and not guilty of the misdemeanor within twelve months, entitled to an acquittal. *Turley* v. *State*, 11.

See BOOK DEBT. *Perkins* v. *Moss*, 671.

LIS PENDENS.

Conveyances pending a suit. A deed executed pending a suit by parties to the suit, does not affect the title, but the purchaser, though not a party, is bound by the decree. *Garretson* v. *Brien*, 534.

MANSLAUGHTER.

See CRIMINAL LAW.

MARRIAGE SETTLEMENT.

Power of married women. A married woman, who by marriage contract has provided that her real estate "shall remain, and enure to her sole use and benefit, subject to her uncontrolled disposition and pleasure, as much as if she remained an unmarried woman, with the further right of selling or disposing of it by her last will and testament," has the power to dispose of the land by executory contract of sale. *Reynolds* v. *Brandon*, 593.

MONTGOMERY, CRIMINAL COURT OF.

See COURTS, SPECIAL.

MORTGAGE.

1. *By Deposit of Title Deeds.* A mortgage by parol and deposit of title deeds is not valid in Tennessee. *Meador* v. *Meador*, 562.

2. *To surety, available to creditor.* A mortgage executed by a debtor directly to his surety, to be void if the debts are paid, is for the security of the creditors as well as the surety. *Saylors* v. *Saylors*, 525.

3. *Sale by mortgagor and mortgagee.* Such mortgage made without a power of sale by the mortgagee, precludes a sale of the property by the mortgagor, with the consent but without the joinder of the mortgagee, unless with consent of the creditors, or with satisfaction of their debts. A payment to the surety will not be sufficient. *Ib.*

MOTION,

Against Revenue Collector. Costs accrue from time of notice. *State* v. *Dail*, 272.

MURDER.

See CRIMINAL LAW. *Williams* v. *State*, 376; *Alexander* v. *State*, 475; *Riddle* v. *State*, 401.

NEW TRIAL.

See CRIMINAL LAW. *Anderson* v. *State*, 86. ERROR. *Riddle* v. *State*, 401; *Vincent* v. *State*, 120.

PARTIES.

See APPEAL. *Reynolds* v. *Brandon*, 393. CHANCERY PRACTICE. *Saylors* v. *Saylors*, 525; *Fulton* v. *Davidson*, 614.

PARTITION.

Bill to sell for, or for debt. See CHANCERY SALE. *Fulton* v. *Davidson*, 614.

PAYMENT.

Of distributive share to County Court Clerk. A payment of a distributive share to the Clerk of the County Court is not a good payment. *Stewart* v. *Glenn*, 581.

See APPROPRIATION. *Fulton* v. *Davidson*, 614.

PERJURY.

See CRIMINAL LAW, INDICTMENT. *State* v. *Bowius*, 29.

PLEADING.

1. *Averment must be specific.* A declaration upon a written promise by the assignor of a note to pay it, with a recital that it has been put into a deed of trust of the maker, concluding: "if said deed satisfies

PLEADING—*Continued.*

the above note, then this obligation to be void," must contain an averment that the deed of trust has been foreclosed. An averment that the deed has failed to satisfy the note, is not good. *Hyde* v. *Darden*, 515.

2. *Double.* Under the Act of 1860, c. 102, allowing double pleading in criminal cases, the several pleas must be put in so as to be tried at the same time. *Crippen* v. *State*, 25.

POISON.

Proof of what is. See CRIMINAL LAW. *Maples* v. *State*, 408.

Attempt to. *Collins* v. *State*, 14.

POWER.

See MARRIAGE SETTLEMENT. *Reynolds* v. *Brandon*, 593.

PRACTICE IN SUPREME COURT.

1. *Remanding cause.* That a case has been prepared in view of a course of decision since reversed, is no ground for remanding the cause for cumulative proof on points not controlling under the former holdings. *McDonald* v. *Kirby*, 607.

   See COSTS. *McDonald* v. *Kirby*, 607.

2. *Remanding to make parties.* The Supreme Court will remand a cause to make necessary parties where the parties before the Court have a meritorious cause of action. *Stewart* v. *Glenn*, 581.

3. *Remanding cause.* The Supreme Court will, in proper cases, in aid of substantial right, remand to the Chancery Court to make proper parties. *Saylors* v. *Saylors*, 525.

4. *Writ of error.* Where a record is filed with the clerk of the Supreme Court, but no bond to prosecute a writ of error, and no notice to the adverse party, it will not operate as a writ of error. *Moody* v. *McNeilly*, 544.

5. *Bond bad in form and out of time.* An *appeal* bond in such case, filed after the lapse of a year from the final decree, will not give the effect of a writ of error to a filing of the record in time. *Ib.*

6. *Motion to dismiss, when in time.* A motion to dismiss a writ of error, or strike a cause from the docket, made the second term after the filing of the record, and more than three years from the decree, no notice of the fact of filing being shown, is in time. *Ib.*

7. *Receiver.* The Supreme Court will appoint a receiver in a cause pending there by appeal. *West* v. *Weaver*, 589.

   In Criminal cases. See CRIMINAL LAW, PRACTICE, ERROR. *State* v. *Steele*, 135; *Wilcox* v. *State*, 110; *Henslie* v. *State*, 202; *Anderson* v. *State*, 86; *Vincent* v. *State*, 120.

   In Chancery. See CHANCERY PRACTICE.

PRESUMPTION.

Against error. See ERROR. *Sible* v. *State*, 137; *Turner* v. *State*, 452.

In Criminal cases. *Anderson* v. *State*, 86.

PRIVILEGE.

1. *Constitution: Law. Judicial construction.* The judicial construction of the word "privilege," established before the Constitution of 1870, is adopted by that Constitution. *State* v. *Schlier*, 281.

2. *Tax. Valid, though unequal.* The Act of 1870, c. 71, s. 1, taxing photographers as exercising a privilege, is constitutional. The fact that the privilege is discriminated according to the size of the town where the establishment is situate, does not affect the constitutionality of the law. *Ib.*

3. *Defined.* The exercise of an occupation or business which requires a license from some proper authority, designated by a general law, and not open to all or any one without such license, is a privilege within the meaning of the Constitution. *Ib.*

PRIZE CANDY.

See GAMING. *Eubanks* v. *State*, 488.

PROCESS.

Venire not. *White* v. *State*, 338.

PROFANITY AND BLASPHEMY.

See CRIMINAL LAW. *State* v. *Steele*, 135.

PROSECUTOR.

See CRIMINAL LAW. *Dove* v. *State*, 348.

RAPE.

See CRIMINAL LAW, INDICTMENT. *Hill* v. *State*, 317.

Assault to commit. CRIMINAL LAW, INDICTMENT. *Dillard* v. *State*, 260; *Jones* v. *State*, 445.

RECEIVER.

Supreme Court will appoint. See PRACTICE. *West* v. *Weaver*, 589.

RECEIVING STOLEN GOODS.

Defined. See ERROR. *Rice* v. *State*, 215.

RECORD.

1. *Unsigned Minutes.* An entry made by a clerk, but never signed by the presiding judge, by reason of his sickness and death, showing the discharge of a jury in a capital case by consent of the prisoner, is sufficient evidence of the fact of discharge by consent. *Moore* v. *State*, 493.

RECORD—*Continued.*

On change of venue. See CRIMINAL LAW. *Logston* v. *State*, 414.

Certifying to Special Court. See COURT, SPECIAL. *Dove* v. *State*, 348.

CRIMINAL LAW, PRACTICE.

Venire not essential in transcript. *Sible* v. *State*. 137.

RECOUPMENT.

1. *Must arise out of the matter sued on.* A landlord having contributed to cause injury to his renter's land by trespasses of stock, promised that if the renter would not hurt his stock, he would pay for the injuries done by them. On a suit by the landlord for his rent, the lessee offered to recoup the damage by the landlord's stock. Held that the damages did not so arise out of the contract sued on as to be a proper subject of recoupment. *Hulme.* v *Brown*, 679.

2. *Damage by leakage.* If a plaintiff ship oil in unseasoned casks, whereby it is lost, the consignee, on being sued for the price, may recoup the damages arising from the loss of the oil. *Briggs* v. *Montgomery*, 673.

REGISTRATION.

Not affected by consideration of paper. The fact that a paper, registered after the occupation of the county by Federal authority, recited a Confederate money consideration, does not affect the validity of the registration. *McDonald* v. *Kirby*, 607.

REMANDING CAUSE.

See CHANCERY PRACTICE. *Fulton* v. *Davidson*, 614. PRACTICE IN SUPREME COURT, 1, 2, 3.

REVENUE COLLECTOR.

See CRIMINAL LAW. *Gibbs* v. *State*, 72; *State* v. *Cameron*, 78.

See MOTION. *State* v. *Dail*, 272.

ROADS.

1. *Signs at railroad crossings.* A turnpike company is not the overseer of a public road within the meaning of the Code, 1223, requiring notices to be placed at every crossing of their roads by a railroad, to "look out for the cars," etc. *Louisville and Nashville T. Co.* v. *State*, 129.

2. *Overseer.* An indictment against an overseer for failing to keep a road in repair, which describes him, not as overseer of a particular road, but as "overseer of roads," is bad. *State* v. *McElroy*, 69.

ROBBERY.

Includes larceny. *Tucker* v. *State*, 484.

SALE OF LAND.

1. *Deficiency. Land not in possession.* Where in a sale of several tracts of land, the vendor included nineteen and three-forth acres, which

SALE OF LAND—*Continued.*

he represented to be his, but to which he had no title, and which he did not have possession of, nor deliver to purchaser, it was held that a bill in equity would lie to have compensation for the deficiency. *Bradley* v. *Dibbrel*, 522.

2. *Eviction.* In such case it is not necessary to aver eviction, *Ib.*, 522.

SELF DEFENSE.

See CRIMINAL LAW. *Williams* v. *State*, 376.

SEPARATE ESTATE.

See MARRIAGE SETTLEMENT. *Reynolds* v. *Brandon*, 593.

SET-OFF.

See HUSBAND AND WIFE, 1. RECOUPMENT.

SET-OFF IN EQUITY.

Against assignee. A debt due from the assignor of a judgment to the defendant in the judgment, can not be set-off by bill in equity against a *bona fide* holder of the judgment, without notice. It is otherwise at law, but equity will not actively interfere to grant relief. *Catron* v. *Cross*, 584.

See HUSBAND AND WIFE. *Stewart* v. *Glenn*, 581.

SLAVES.

Equitable Assets. See ADMINISTRATION. *Fulton* v. *Davidson*, 614.

Use of. *Killebrew* v. *Murphy*, 546.

SPIRITUOUS LIQUORS.

1. *Oath not to adulterate.* The Act of 1859–60, c. 81, s. 4, making it indictable to sell spirituous liquors without taking an oath not to adulterate, is in force. *State* v. *Martin*, 487.

2. Selling near election ground. See CRIMINAL LAW. *State* v. *Irvine*, 155; *Manis* v. *State*, 315.

STATUTES CITED.

Jurors,	1866–7, c. 5, s. 1	76
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"	1868, c. 79, s. 14	84, 85
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"	1865–6, c. 33	76
"	1866–7, c. 5, s. 1	76
"	" c. 26, s. 15	76
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Special court,	1870, c. 115,	114
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STATUTES CITED—*Continued.*

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" " "	c. 53, s. 3	316
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Assault to ravish,	1829, c. 23, ss. 1 and 53	448
Drunkenness,	1842, c. 94	467
	1844, c. 98	467
	1859–60, c. 10	467
Robbery,	1865, c. 5, s. 3	485
Adulteration,	1859–60, c. 81	488
"	1867–8, c. 56	488
Escheat,	1850, c. 54	539
"	1827, c. 64	540
Dower,	1823, c. 37, s. 4	542
Executor's bond,	1838, c. 111, s. 18	635, 636
" "	1813, c. 119, s. 3	628
Slaves,	1827, c. 61	627, 640
Sales, cost of,	1855, c. 264, s. 3	645
Slavery,	1813, c. 56	660
	1835, c. 19; 1839, c. 7; 1799, c. 9, s. 1; 1829, c. 23, s. 2	661
Marriage,	1715, c. 31, s. 6	664
	1741, c. 1, s. 7	664, 667, 669
	1778, c. 5, s. 1	664
	1778, c. 7	665, 667, 669
	1787, c. 6, s. 3	665
	1849–50, c. 186	668
	1866, c. 58	668, 670
Book debt,	1756, c. 4, s. 2	673
Accounts,	1819, c. 25, s. 1	676
Non est factum,	" c. 25, s. 4	677
County Courts,	1829, 37; 1785, c. 3; 1817, c. 48, s. 8,	689
	1827, c. 49, ss. 1, 14, 15	692, 699
	1835, c. 6	693
County Commissioners,	1867-8, c. 65	696

STATUTE.

Passed when signed. The time at which an act of Assembly takes effect, forty days after its passage, is ascertained by computing from the date of its signature by the Governor, or its final passage over his veto. *Logan* v. *State*, 442.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STAYOR.

See ADMINISTRATION. *Smith* v. *Slaughter*, 565.

SURETY.

1. *Right of creditor to securities of.* See MORTGAGE. *Saylors* v. *Saylors*, 525.

2. *Bill quia timet.* A surety or assignor liable to pay a debt on the failure of the principal debtor, may sustain a bill *quia timet* before payment made or loss incurred. *Ib.*

3. *Same. Assignee, or creditor, necessary party.* In such case, the assignee ought to be a party to the record; and if he is not, the decree must show that the recovery is for his benefit. *Ib.*

4. A creditor and surety are respectively entitled each to the benefit of the securities of the other for the payment of the debt in which they are interested. *Ib.*

TAXATION AND REPRESENTATION.

See CONSTITUTIONAL LAW. *Pope* v. *Phifer*, 682; *State* v. *Schlier*, 281.

TERM OF COURT.

See COURTS.

TIME, AVERMENT OF.

Required in indictments. *King* v. *State*, 148.

How made. *State* v. *Wills*, 148, n.

TRUSTEE.

1. *Fund depreciating. Where kept.* A fiduciary holding a fund which he alleges he collected in currency, which has depreciated on his hands, showing that he has kept the identical moneys separate from his own funds, may discharge his liability by delivering the same, without interest. *Saunders* v. *Gregory*, 567.

2. *Same Where not kept.* If he has not kept the identical fund, then he will be charged with the nominal sums collected, without allowance for depreciation, and interest from the time he ought to have paid the moneys or to have tendered them into court, but not with interest for such time as he was bound by orders of court to have the money in hand, or was prevented by war from loaning. *Ib.*

3. *Bill for instructions.* A trustee for infants may maintain a bill for instructions as to matters arising after the creation of the trust, not provided for in it; as a compromise; making it necessary to raise funds, or the refusal of one co-trustee in the deed to act *Reynolds* v. *Brandon*, 593.

4. *Loan contrary to order.* A commissioner for sale of lands and slaves, being appointed a trustee for infants, with directions to loan out the funds arising from the sale belonging to them, on good security, hav-

TRUSTEE—*Continued.*

ing loaned the fund without security, to a person then solvent, was held liable for the loss of the fund by the subsequent insolvency of the borrower. But the borrower having furnished necessaries to the minor beneficiaries, the trustee was allowed the benefit of the credit arising therefrom. *Fulton* v. *Davidson*, 614.

5. *Interest.* The holding of a fund probably required for the payment of debts, will not charge a trustee with interest, in the absence of any proof that the fund was used for the profit of the trustee. *Ib.*

UNITED STATES.

Constitution of, when operative on States. See CONSTITUTIONAL LAW, *Andrews* v. *State*, 165; *Lonas* v. *State*, 287.

VALUE.

See CRIMINAL LAW, INDICTMENT, *Taylor* v. *State*, 460; *Vincent* v. *State*, 120; *Lewis* v. *State*, 333.

VENIRE.

See CRIMINAL LAW, VENIRE.

VENUE.

See CRIMINAL LAW, VENUE.

VERDICT.

See CRIMINAL LAW, VERDICT.

WAIVER.

See CRIMINAL PRACTICE, *McBean* v. *State*, 20; *Henslie* v. *State*, 202.

WILL.

Codicil. Republication. A testator made a will devising his home place. He afterwards bought eight acres adjoining, on which he erected a horse mill. Some time after he executed a codicil, which makes no allusion to the devise of the home place. The eight acres would be undisposed of unless held to pass by that devise. Held to pass. *Smith* v. *Puryear*, 706.

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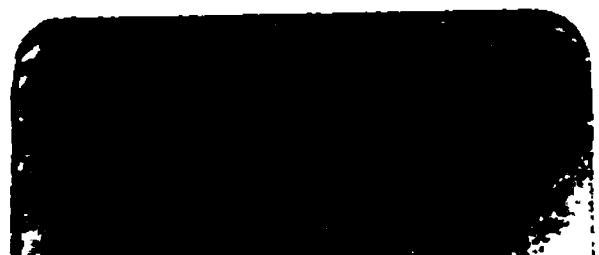
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